RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-6855

In The
Supreme Court of the United States

MARION WILSON,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES –
WILSON V. SELLERS, CASE NO. 16-6855

Supreme Court of Georgia

Case No. S99P0651

Marion Wilson, Jr.

Appellant

v.

State of Georgia

Appellee

11/01/1999 Decision of the Supreme Court of Georgia Affirming Appellant's Convictions and Death Sentence

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Superior Court of Butts County (Georgia)

Civil Case No. 2001-V-38

Marion Wilson, Jr.

Petitioner

v.

William Terry, Warden

Respondent

12/01/2008 Decision of the Superior Court Court Denying Petition for Writ of Habeas Corpus

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Supreme Court of Georgia

Case No. S09E0796

Marion Wilson, Jr.

Applicant

v.

William Terry, Warden

Respondent

05/03/2010 Order of the Supreme Court of Georgia Denying Certificate of Probable Cause to Appeal

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U.S. District Court Middle District of Georgia (Macon)

CIVIL DOCKET FOR CASE #: 5:10-cv-489 (MTT)

Date Filed	#	Docket Text
12/19/2013	51	ORDER DENYING 1 Petition for Writ of Habeas Corpus filed by Marion Wilson, Jr. The Court issues a COA on the following issue: Whether trial counsel was ineffective during the penalty phase by failing to conduct a reasonable investigation into mitigation evidence and by failing to make a reasonable presentation of mitigation evidence. In relation to all other claims, grounds, and issues raised in Wilson's 1 Petition for Writ

of Habeas Corpus, the Court finds the standard shown above for the grant of a COA has not been met. Ordered by U.S. District Judge Marc Thomas Treadwell on 12/19/2013. (tlh) (Entered: 12/19/2013)

United States Court of Appeals for the 11th Circuit

Court of Appeals Docket # 14-10681

Marion Wilson, Jr.

Appellant

v.

Warden, Georgia Diagnostic Prison

Appellee

Date Filed	Docket Text
12/15/2014	OPINION REINSTATED***Opinion issued by court as to Appellant Marion Wilson, Jr.. Decision: Affirmed. Opinion type: Published. Opinion method: Signed. (Opinion corrected 12/16/2014) – [Edited 12/16/2014 by JRP] – [Edited 11/15/2016 by JSC]
10/13/2015	Corrected Amicus Brief filed by Amicus Curiae Adam Mortara. Service date: 10/09/2015 email – Attorney for Appellants: Harth, Kammer; Attorney for Appellees: Burton, Graham.

10/16/2015	Supplemental Authority filed by Appellee Warden. (ECF: Sabrina Graham)
08/23/2016	En Banc Opinion issued by court. Decision: Remanded to the panel. Opinion type: Published. Opinion method: Signed.
11/15/2016	Opinion issued by court as to Appellant Marion Wilson, Jr.. Decision: Affirmed. Opinion type: Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.

In the Supreme Court of Georgia

Decided: NOV 01 1999

S99P0651. WILSON v. THE STATE

SEARS, Justice

A jury convicted Marion Wilson, Jr. of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun.[1] The jury fixed the sentence for the murder at death, finding as a statutory aggravating circumstance that Wilson

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[1] The crimes occurred on March 28, 1996. Wilson was indicted on May 29, 1996, by the Baldwin County Grand Jury for malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. The State filed written notice of its intent to seek the death penalty on July 22, 1996. Wilson's trial began on October 27, 1997, and the jury found Wilson guilty on all counts. The felony murder conviction was vacated by operation of law. *Malcolm v. State*, 263 Ga. 369 (4) (434 SE2d 479) (1993); OCGA § 16-1-7. On November 7, 1997, the jury recommended the death sentence for malice murder. In addition to the death sentence, the trial court imposed consecutive sentences of life imprisonment for armed robbery, twenty years in prison for hijacking a motor vehicle, five years in prison for possession of a firearm during the commission of a crime, and five years in prison for possession of a sawed-off shotgun. Wilson filed a motion for a new trial on December 3, 1997, and supplemented his motion on December 10, 1998. The trial court denied the motion for a new trial on December 18, 1997. The appeal was docketed with this Court on February 3, 1999, and orally argued on April 19, 1999.

committed the murder while engaged in the commission of an armed robbery.[2] For the reasons that follow, we affirm.

The evidence at trial showed that on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat.

Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene.

On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight.

Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three notebooks

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[2] OCGA § 17-10-30(b)(2).

of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photograph of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgville [sic] Wal-Mart where Butts and Wilson retrieved Butts's automobile.

1. Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a

reasonable doubt the existence of a statutory aggravating circumstance.[3] The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt.[4]

The same standard of review of the evidence is applicable to the denial of the defendant's motion for a directed verdict.[5] Accordingly, we disagree with Wilson's contention that his motion for a directed verdict was improperly denied by the trial court.

2. Wilson claims that his rights to freedom of speech and freedom of association were violated during the penalty phase of his trial by the introduction of evidence showing his involvement with the Folks gang.[6] In support of his contention, Wilson relies upon *Dawson v. Delaware*[7] wherein the United States Supreme

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[3] *Jackson v. Virginia*, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979); OCGA § 17-1030(b)(2).

[4] OCGA § 16-2-20(b)(3, 4); see *Mize v. State*, 269 Ga. 646 (1) (501 SE2d 219) (1998); *Chapman v. State*, 263 Ga. 393 (435 SE2d 202) (1993); *Gambrel v. State*, 260 Ga. 197 (391 SE2d 406) (1990).

[5] *Miller v. State*, 270 Ga. 741 (1) (512 SE2d 272) (1999); *Smith v. State*, 267 Ga. 502 (3) (480 SE2d 838) (1997).

[6] No such evidence was introduced during the guilt/innocence phase of the trial.

[7] *Dawson v. Delaware*, 503 U.S. 159 (112 SC 1093, 117 LE2d 309) (1992).

Court held that a defendant's association with a racist organization was protected by the First and Fourteenth Amendments and that evidence of such an association could not lawfully be introduced unless relevant to the issues to be tried. Presentation by the State of evidence that proves "nothing more than [a defendant's] abstract beliefs[]"[8] invites punishment of a criminal defendant's exercise of constitutionally protected rights. In the present case, however, evidence of Wilson's involvement with the Folks gang and of the violent nature of that gang was relevant to the issues to be decided by the jury during the sentencing phase of his trial. The State presented testimony that the Folks gang required its members to commit violent, criminal acts and that Wilson held a powerful position in the gang. The State also presented a tape-recorded statement of Wilson claiming to be the gang's "chief enforcer," Wilson's handwritten notebooks regarding the gang, and a photograph found in Wilson's residence of a young man displaying a gang hand sign. Upon our review of the evidence presented, we find that the jury was not invited to punish Wilson for any abstract beliefs he might have held but, rather, that the jury was permitted to consider punishing Wilson more severely for the threat he presented to society as supported by the evidence. Furthermore, because the evidence in question was not objected to at trial, Wilson is barred from challenging its introduction on appeal.[9]

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[8] Id. at 167.

[9] *Earnest v. State*, 262 Ga. 494 (1) (422 SE2d 188) (1992).

3. Wilson contends that the trial court allowed improper expert testimony about gangs during the sentencing phase of his trial. The testimony in question was not objected to at trial and cannot now be complained of on appeal.[10]

4. Wilson claims that self-inculpatory statements allegedly made by Robert Earl Butts to three of Butts's fellow inmates were made "during the pendency of the criminal project"[11] in which Wilson and Butts had been engaged as co-conspirators and, therefore, that those alleged statements should have been admitted during the guilt/innocence phase of Wilson's trial. The trial court excluded the evidence on the basis that any conspiracy between Wilson and Butts ended when Wilson gave statements to law enforcement officers revealing certain details of the crime and seeking to place blame for the murder on Butts. While we agree with the trial court that any conspiracy between Butts and Wilson ended upon Wilson's statements to authorities,[12] we further add that the statutory exception to the hearsay rule upon which Wilson relies makes declarations of conspirators admissible only *against* other conspirators.[13] It is the long-standing rule in this state that declarations to third persons to the effect that the

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[10] Id.

[11] OCGA § 24-3-5.

[12] *Crowder v. State*, 237 Ga. 141, 153 (227 SE2d 230) (1976).

[13] See *Dunbar v. State*, 205 Ga. App. 867, 869 (424 SE2d 43) (1992).

declarant and not the accused was the actual perpetrator are, as a rule, inadmissible.[14]

Furthermore, although this type of hearsay evidence is generally inadmissable,[15] under the principles set forth by this Court in *Drane v. State*[16] and by the United States Supreme Court in *Chambers v. Mississippi*[17] and *Green v. Georgia*,[18] there may be exceptional circumstances that make the hearsay evidence sufficiently reliable and necessary to require its admission. However, as stated in *Turner v. State*,[19] whenever defense counsel seeks to admit this type of hearsay evidence to support a claim that someone other than the defendant is responsible for the crimes being tried, counsel:

> must make a proffer in which the reliability and necessity of the hearsay evidence are thoroughly set out, and the trial court's ruling

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[14] *Timberlake v. State*, 246 Ga. 488 (1) (271 SE2d 792) (1980); *Lyon v. State*, 22 Ga. 399 (1857).

[15] See *Timberlake v. State*, supra at (1).

[16] 265 Ga. 255 (455 SE2d 27) (1995).

[17] *Chambers v. Mississippi*, 410 U.S. 284, 302 (93 SC 1038, 35 LE2d 297) (1973) (failure to admit evidence of another's confession offered during guilt/innocence phase of trial constituted a violation of due process right).

[18] *Green v. Georgia*, 442 U.S. 95 (99 SC 2150, 60 LE2d 738) (1979) (failure to admit evidence of co-indictee's confession offered at punishment phase of trial violated due process right because testimony was highly relevant to a critical issue in punishment phase and substantial reasons existed to assume its reliability).

[19] 267 Ga. 149 (476 SE2d 252) (1996).

> must reflect consideration of the proffered evidence and a determination that the evidence does or does not show "persuasive assurances of trustworthiness," or was made under circumstances providing considerable assurances of its reliability.[20]

Despite being tried approximately one year after the *Turner* ruling was issued, Wilson, the hearsay proponent at trial, did not utilize the procedures set forth in *Turner* and did not obtain a ruling from the trial court evidencing its consideration of the proffered hearsay evidence under *Turner*. Accordingly, the trial court did not err in failing to address whether, under the standards set forth in *Green*, *Chambers*, and *Drane*, the hearsay evidence in question was sufficiently reliable, relevant, and necessary to require its admission in the guilt/innocence phase of Wilson's trial.

5. Wilson contends that the trial court erred in not striking certain jurors for cause. We find no reversible error in the trial court's rulings.

(a) Juror James Peugh, a former defense attorney, stated during his individual voir dire that he believed "99.9 percent of [criminal defendants] were guilty. . . ." The trial court denied a defense motion that the juror be stricken for cause, finding the juror had "rehabilitated himself" by stating in three separate responses that he thought he could be fair. Whether to strike a juror for cause lies within the sound discretion

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[20] Id., 267 Ga. at 155.

of the trial court,[21] and a trial court is not obligated to strike a juror for cause in every instance where the potential juror expresses doubts about his or her impartiality or reservations about his or her ability to set aside personal experiences.[22] The trial judge is uniquely positioned to observe a potential juror's demeanor and thereby to evaluate his or her capacity to render an impartial verdict.[23] The record reveals no evidence Juror Peugh had formed an opinion so fixed and definite that it would not be changed by the evidence or the charge of the court,[24] and, accordingly, we find that the trial court's denial of Wilson's motion to strike Juror Peugh for cause was not a manifest abuse of its discretion.[25]

(b) Juror John Mayzes had casually conversed with the victim about the Bible three times in Juror Mayzes's front yard but was otherwise completely unacquainted with the victim. Wilson did not move to strike Juror Mayzes for cause, and we find the trial did not err by not striking him sua sponte.[26]

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[21] *Holmes v. State*, 269 Ga. 124 (2) (498 SE2d 732) (1998); *Garland v. State*, 263 Ga. 495 (1) (435 SE2d 431) (1993).

[22] Id.; *Waldrip v. State*, 267 Ga. 739 (8) (c) (482 SE2d 299) (1997); *Johnson v. State*, 262 Ga. 652 (2) (424 SE2d 271) (1993).

[23] See *Greene v. State*, 268 Ga. 47 (485 SE2d 741) (1997); *Arnold v. State*, 236 Ga. 534 (6) (224 SE2d 386) (1976).

[24] See *Bright v. State*, 265 Ga. 265 (455 SE2d 37) (1995); *Childs v. State*, 257 Ga. 243 (357 SE2d 48) (1987); *Waters v. State*, 248 Ga. 355 (2) (283 SE2d 238) (1981).

[25] See *Diaz v. State*, 262 Ga. 750 (2) (425 SE2d 869) (1993).

[26] See *Mize v. State*, supra at (6) (c); *Spencer v. State*, 260 Ga. 640 (1) (398 SE2d 179) (1990); *Childs v. State*, supra; see also

(c) Juror Henry Craig stated in his individual voir dire that his son and daughter had repeated to him statements of persons associated with the Sheriff's Department that indicated the Sheriff was confident in who he thought committed the crime. However, the juror clearly stated that he had not formed an opinion about the guilt or innocence of the defendant, and both defense counsel and the trial court questioned the juror as to his ability to disregard the hearsay statements and to consider only the evidence presented at trial. Accordingly, we find no error in the trial court's denying the defendant's motion to strike the juror for cause.[27]

(d) Wilson complains that, because the victim had worked as a corrections officer, the trial court erred in denying his motion to strike for cause all jurors who either worked for or who had relatives who worked for the Department of Corrections. Blanket disqualification of jurors based solely upon their membership in a group to which the victim belonged is not required.[28] The record reveals that the trial court adequately considered the potential bias of individual jurors connected to the Department of Corrections, and,

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Blankenship v. State, 258 Ga. 43 (2) (365 SE2d 265) (1988) (applying Rule 10.1 of the Georgia Uniform Rules for the Superior Courts, 253 Ga. 824-25, when party failed to object to trial court's excusing certain jurors).

[27] *Bright v. State*, supra at (8); *Waters v. State*, supra; *Tennon v. State*, 235 Ga. 594 (2) (220 SE2d 914) (1975); *Irvin v. Dowd*, 366 U.S. 717, 723 (81 SC 1639, 6 LE2d 751) (1961).

[28] *Jordan v. State*, 247 Ga. 328 (6) (276 SE2d 224) (1981); *Burgess v. State*, 264 Ga. 777 (8) (450 SE2d 680) (1994).

accordingly, we conclude that the trial court did not err in denying Wilson's blanket motion.

6. Wilson contends the trial court erred by not being present while the jury viewed the crime scene. Prior to the jury view, the defendant, the State, and the trial court agreed upon the procedure to be employed. The jury was to ride on a bus that would pause momentarily at the scene. The defense objected to having the trial judge travel on the bus with the jury, and the trial court acceded to the objection. The issue of whether the trial judge would follow in separate vehicle was not discussed. The trial court dismissed the jury from the courtroom to board the bus with instructions that no one was to point at anything or to discuss anything at the scene and with instructions that they were to recognize their arrival at the crime scene based on their memory of the street names discussed at trial and by the momentary pause of the bus. The defendant and his counsel attended the jury view by following the bus in separate vehicles. No jury members left the bus at the scene.

Following the jury view, the defendant raised no objection to the jury view, including the apparent absence of the trial judge, and the defendant did not move for a mistrial. In his appeal, the defendant has not set forth any purported irregularity in the jury view, other than the trial judge's absence, despite the fact that he and his counsel were present at the jury view and enjoyed a vantage point that, given his objection to having the trial judge ride on the bus, was equivalent to

that which the trial judge would have had if he had followed in a separate vehicle.

We find that the trial judge should have attended the jury view, even though his role at the jury view would have been minimal given the defendant's objection to the trial judge's presence on the bus. The absence of the trial judge from trial proceedings is reversible error when it is objected to and when it results in some harm.[29] However, in this case, no objection was made to the trial judge's brief[30] absence, and the defendant and his counsel, who were both present at the jury view, are unable to demonstrate any harm. Accordingly, the trial judge's absence during the jury view is not reversible error.

7. The defendant contends that the charge given to the jury regarding a defendant's mere presence during the commission of a crime was potentially misleading, despite the fact that it was read accurately from the suggested pattern charge.[31] The charge was a correct statement of the law and, particularly when read

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[29] *Horne v. Rogers*, 110 Ga. 362 (5, 6) (35 SE 715) (1900); *Pritchett v. State*, 92 Ga. 65 (2) (18 SE 536) (1893); *O'Shileds v. State*, 81 Ga. 301 (6 SE 426) (1888); see also *Malcolm v. Pollock*, 181 Ga. 687 (183 SE 917) (1935).

[30] The actual view of the crime scene by the jury was completed during the momentary pause by the bus. The mere transportation of the jury, of course, did not require the superintendence of the trial judge.

[31] Suggested Pattern Jury Instructions, Vol. II, Criminal Charges, Part 3 (C), p. 18 (1995).

together with the other charges, would not have misled the jury.

8. Wilson contends that the trial court erred by failing to provide for opening statements at the beginning of the sentencing phase and by giving inadequate guidance to the jury in the sentencing phase. We disagree. Allowing opening statements at the beginning of the sentencing phase is the better practice, but it is not required.[32] Furthermore, the trial court's instructions at the beginning of the sentencing phase, particularly when viewed together with the instructions given to the jury before it began deliberating on Wilson's sentence, provided ample guidance to the jury in fixing Wilson's sentence in the manner prescribed by law.

9. Wilson contends that the trial court's failure to charge the jury a second time on the credibility of witnesses during the penalty phase was reversible error. A second charge might be the better practice, but we find that the trial court had fully charged the jury with regard to the credibility of witnesses and expert witnesses during the guilt/innocence phase of the trial. The trial court's charge would have been understood by the jury to apply to all witnesses in both phases of the trial. This is comparable to a trial court's not again defining reasonable doubt in the sentencing phase after doing so in the guilt/innocence phase, which we have held not to be grounds for reversal.[33] Accordingly,

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[32] *Smith v. State*, 270 Ga. 240 (15) (510 SE2d 1) (1998).

[33] *Cromartie v. State*, 270 Ga. 780 (22) (514 SE2d 205) (1999); *Bennett v. State*, 262 Ga. 149 (10) (f) (414 SE2d 218) (1992).

we find that the trial court's failure to charge the jury a second time on the credibility of witnesses was not reversible error.

10. The trial court was not required to charge the jury on a burden of proof applicable to non-statutory aggravating circumstances.[34]

11. The trial court did not err in failing to instruct the jury that its findings as to mitigating circumstances need not be unanimous because the trial court clearly charged the jury that it was not necessary to find *any* mitigating circumstances in order to impose a life sentence instead of the death penalty.[35]

12. Wilson contends that the trial court erred by not charging the jury that a finding of an aggravating circumstance must be unanimous. However, reversal on this ground is not required when, as in this case, the trial court charges the jury that its verdict as to the penalty must be unanimous.[36]

13. Wilson contends that the trial court erred by denying his motion for a mistrial when, during the

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[34] *Cromartie*, supra; *Speed v. State*, 270 Ga. 688 (46) (512 SE2d 896) (1999); *Whatley v.* State, 270 Ga. 296 (11) (509 SE2d 45) (1998); *McClain v. State*, 267 Ga. 378 (8) (477 SE2d 814) (1996); *Ross v. State*, 254 Ga. 22 (5) (d) (326 SE2d 194) (1985); *Ward v. State*, 262 Ga. 293 (29) (417 SE2d 130) (1992).

[35] *Palmer v. State*, 271 Ga. 234 (6) (517 SE2d 502) (1999); *McClain v. State*, supra at (6); *Wellons v. State*, 266 Ga. 77 (23) (463 SE2d 868) (1995); *Ledford v. State*, 264 Ga. 60 (20) (439 SE2d 917) (1994).

[36] *Sears v. State*, 270 Ga. 834 (7) (e) (ii) (514 SE2d 426) (1999); *Davis v. State*, 263 Ga. 5 (15) (426 SE2d 844) (1993).

penalty phase, the jury heard inadmissible hearsay testimony suggesting Wilson had shot the victim. The hearsay testimony was heard by the jury when a witness for the State was asked when he first heard about Wilson's murder charge and answered, "[An investigator] called me up one day and told me that the boy that had shot me got out of prison and shot somebody else." The granting of a motion for a mistrial is within the discretion of the trial court, and the trial court's ruling will not be disturbed when the trial court has taken remedial measures sufficient to ensure a fair trial.[37] The record reveals that the trial court gave sufficient curative instructions and did not abuse its discretion in denying the defendant's motion for a mistrial.

14. Wilson contends that his right to a fair trial was abridged by the introduction of a photograph of the victim in life and by the manner in which that photograph was introduced. It is not error to admit a photograph of the victim in life; however, the better practice is to have the photograph identified by someone other than a close relative of the victim.[38] In this case, the prosecutor asked the victim's father, the first witness at trial, whether he had given the State a picture of his son. The prosecutor then had the victim's father testify as to the date of and other details about the photograph. The photograph was never shown to the victim's father while he was on the stand, and

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[37] *Jones v. State*, 267 Ga. 592 (1) (b) (481 SE2d 821) (1997); *Cowards v. State*, 266 Ga. 191 (3) (c) (465 SE2d 677) (1996).

[38] *James v. State*, 270 Ga. 675 (5) (513 SE2d 207) (1999); *Whatley v. State*, supra at (8); *Ledford v. State*, supra at (14).

there is no evidence in the transcript of any emotional display on his part. The photograph was later viewed and identified by a non-relative and was then introduced into evidence. We find that the defendant was not denied a fair trial under these circumstances.

15. Wilson contends that the trial court erred in admitting certain photographs which depicted the victim as he was found at the crime scene and as he appeared shortly before autopsy. We find that these photographs were material, relevant, and admissible.[39]

16. (a) We find that the prosecution's characterization of the victim as a helpless, nice, unarmed person was relevant to the jury's determination of guilt as to the malice murder charge and in no way unfairly prejudiced the defendant, constituted improper victim impact testimony, or denied the defendant a fair trial.

(b) Contrary to the defendant's contention, we conclude that the prosecution did not invite the jury to place itself in the place of the victim.

(c) During his closing argument at the end of the guilt/innocence phase of the trial, the prosecutor interspersed his argument with direct quotations from the Georgia Code, arguing how the statutory elements set forth in the quotations had been proved. The practice of "reading the law" in a criminal proceeding was condemned by this Court some time ago as offering a

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[39] *Jackson v. State*, 270 Ga. 494 (8) (512 SE 241) (1999); *Jenkins v. State*, 269 Ga. 282 (20) (498 SE2d 502) (1998); *Crozier v. State*, 263 Ga. 866 (2) (440 SE2d 635) (1994).

license for counsel to present portions of the law to the jury that would not constitute part of the trial court's charge.[40] However, "[c]ounsel have every right to refer to applicable law during closing argument" when that law will be charged by the trial court.[41] Indeed, we have held that restraining counsel from discussing and arguing law that will be charged to the jury is error.[42] Accordingly, we conclude that under the circumstances of this case, the trial court did not err in failing to restrain the State from discussing the law in the manner complained of.

(d) Wilson contends the State, in its closing argument in the guilt/innocence phase, made statements that improperly emphasized the defendant's exercise of his right not to testify and the failure of Butts, the other participant in the murder, to give a statement after being arrested.[43] We find no evidence in the record that the defendant objected to the purportedly inappropriate statements or moved for a mistrial, and, generally, such an objection cannot be raised for the first time in a motion for a new trial or on appeal.[44] When no objection has been made at trial, such allegedly improper statements warrant reversal only if they in

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[40] *Conklin v. State*, 254 Ga. 558 (10) (331 SE2d 532) (1985).

[41] Id.; *Felder v. State*, 270 Ga. 641 (3) (514 SE2d 416) (1999).

[42] *Minter v. State*, 266 Ga. 73 (463 SE2d 119) (1995).

[43] Given the defendant's failure to object at trial, we need not address the question of his standing to object to the alleged comment on the post-arrest silence of the co-participant.

[44] *Landers v. State*, 270 Ga. 189 (2) (508 SE2d 637) (1998); *Roberts v. State*, 231 Ga. 395 (1) (202 SE2d 43) (1973).

reasonable probability changed the result of the trial.[45] Without addressing whether the statements were improper, we find that they did not in reasonable probability change the result of the trial and, therefore, cannot serve as grounds for reversal because they were not objected to.

17. Wilson contends that certain portions of the State's opening statement during the guilt/innocence phase of his trial were inflammatory and improperly called into question the impact of the victim's death upon the victim's family. The proper test on review when, as here, the defendant has not objected to allegedly improper statements is whether the statements in reasonable probability changed the result of the trial.[46] We find no such reasonable probability with respect to the statements complained of, and, therefore we need not address whether the statements were improper.

18. Wilson contends that two statements he made to law enforcement officers (one tape-recorded, one written) along with statements he made to police regarding his and Butts's actions after the murder were improperly admitted into evidence. We disagree.

Wilson contends that the statements should have been excluded from evidence because they were allegedly induced by a hope of benefit in violation of OCGA

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[45] *Ledford v. State*, supra at (18) (a); *Todd v. State*, 261 Ga. 766 (2) (410 S.E.2d 725) (1991).

[46] Id.

§ 24-3-50. Wilson's contention at the suppression hearing hinged upon an evaluation of the credibility of witnesses. It is the province of the trial court to weigh the credibility of witnesses in such a hearing, and, unless clearly erroneous, its findings of fact will not be disturbed on appeal.[47] We find no error in the trial court's ruling as to the absence of an inducement by a hope of benefit.

Wilson also contends that he was not made aware of his *Miranda*[48] rights prior to making the contested statements and that, prior to making the tape recorded statement, he had been denied a request for an attorney. This contention also hinged upon the credibility of witness testimony, and we do not find the trial court's assessment of witness credibility in this matter to have been clearly erroneous.[49] Accordingly, we conclude that the trial court did not err in its ruling as to Wilson's *Miranda* rights.

19. The trial court did not err in denying Wilson's motion for a change of venue. Wilson contends that a change of venue was necessary because of pretrial publicity and the fact that, like the victim, a large number of Baldwin County residents were Department of Corrections employees.

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[47] *Gilliam v. State*, 268 Ga. 690 (3) (492 SE2d 185) (1997); *Arline v. State*, 264 Ga. 843 (2) (452 SE2d 115) (1995); *Caffro v. State*, 247 Ga. 751 (279 SE2d 678) (1981).

[48] *Miranda v. Arizona*, 348 U.S. 436 (86 S.Ct. 1602, 16 LE2d 694) (1966).

[49] *Gilliam v. State*, supra.

In order to justify a change of venue based upon pretrial publicity, a capital defendant must show that the trial setting was inherently prejudicial as a result of pretrial publicity or show actual bias on the part of the individual jurors.[50] A change of venue is appropriate in a death penalty case when the "defendant can make a substantive showing of the likelihood of prejudice by reason of extensive publicity."[51] The decisive factor in determining whether a change of venue is required is "the effect of the publicity on the ability of prospective jurors to be objective."[52] The extent and timing of pretrial publicity are also factors to be considered.[53] Our review of the record does not indicate that the pretrial publicity created a likelihood of prejudice. Of the large number of jurors subjected to individual voir dire, none was stricken for cause because of his or her exposure to pretrial publicity.

As to Wilson's contention that the large number of Department of Corrections employees in Baldwin County warranted a change of venue, we note, as in our discussion above regarding the defendant's motion to strike all such persons for cause, that persons are not deemed unqualified to serve as jurors based solely upon their membership in a group to which the victim

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[50] *Jenkins v. State*, supra at (3); *Jones v. State*, 267 Ga. at (1) (a).

[51] *Jones v. State*, 261 Ga. 665 (2) (409 SE2d 642) (1991).

[52] *Freeman v. State*, 268 Ga. 185 (2) (486 SE2d 348) (1997).

[53] Id.; *Thornton v. State*, 264 Ga. 563 (17) (449 SE2d 98) (1994).

belonged.[54] It must be demonstrated that the persons or class of persons will be unable to serve as fair and impartial finders of fact, a showing not made by Wilson in his motions to strike for cause or his motion for a change of venue.

20. Wilson contends that the trial court erred by allowing evidence during the penalty phase of a number of crimes committed by him as a juvenile, including shooting two persons and a dog, first degree arson, criminal trespass, felony obstruction of a law enforcement officer, assault of an officer in a youth detention facility, possession of cocaine, and making a death threat. We disagree. Such records are admissible in the penalty phase of a capital murder case.[55]

Wilson further contends that evidence of his prior criminal activity was improperly admitted during the penalty phase because the evidence was insufficiently reliable. Again, we disagree. "The factors normally considered in sentencing are (1) the character of the defendant, including his previous criminal activity, if any, and (2) the circumstances of the crime on trial."[56] Evidence of bad character and previous crimes must be reliable,[57] but, when considering non-statutory aggravating circumstances, the jury is not required to

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[54] *Jordan v. State*, supra.

[55] *Smith v. State*, supra at (2); *Burrell v. State*, 258 Ga. 841 (7) (376 SE2d 184) (1989); OCGA § 15-11-38(b).

[56] *Ford v. State*, 257 Ga. 461 (1) (360 SE2d 258) (1987); *Kinsman v. State*, 259 Ga. 89 (15) (376 S.E.2d 845) (1989).

[57] *Williams v. State*, 258 Ga. 281 (7) (368 SE2d 742) (1988).

evaluate each and every evidentiary vignette pursuant to the reasonable doubt standard.[58] The trial court is certainly not required to apply such a standard in determining if the evidence is admissible. The fact that the defendant was able to set forth evidence weighing against a finding of guilt as to the previous crimes does not in and of itself make the State's evidence unreliable. We find that the trial court did not err in admitting the contested evidence.

Finally, we find no merit in Wilson's contention that the trial court improperly admitted testimony that Wilson had threatened to kill a man and his mother. Wilson argues that the testimony was inadmissible because it lacked the corroboration required for conviction of the crime of making a terroristic threat.[59] However, we find that the testimony was admissible as evidence of bad character. For the same reasons that evidence of acts reflecting bad character need not be evaluated according to the reasonable doubt standard,[60] such evidence also need not be sufficient to allow conviction under the evidentiary requirements of a specific criminal statute. The evidence need only be reliable.[61]

21. Wilson contends that he was denied a fair trial because the judge who presided over many of the pretrial proceedings was replaced for health reasons

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[58] *Ward v. State*, supra; *Ross v. State*, supra.

[59] See OCGA § 16-11-37 (a).

[60] *Ward v. State*, supra.; *Ross v. State*, supra.

[61] *Williams v. State*, supra.

before the trial began by another judge who presided over the remainder of the case, including two remaining pretrial motion hearings, jury selection, both phases of the trial, and the defendant's motion for a new trial. Prior to the first judge's departure, Wilson requested that only one judge preside over both jury selection and the trial, and this request was accommodated. Wilson made no other objection to the substitution, and, therefore, this argument is waived.[62]

22. Wilson contends that it was error for the trial court to deny his trial counsel's request to be discharged from representing Wilson based on the fact that counsel's wife worked for the Department of Corrections, knew persons who were acquainted with the victim, and was herself casually acquainted with the victim. Our evaluation of the alleged conflict requires us to "examine the particular circumstances of the representation[] to determine whether counsel's undivided loyalties remain[ed] with his . . . client, as they must."[63] The relationship between defense counsel and the victim was both minimal and indirect. Furthermore, the record reveals no evidence that defense counsel was affected by his minimal relationship to the victim. Accordingly, we find that the trial court did not err in ruling that there was no disqualifying conflict of interest.

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[62] *Earnest v. State*, supra.

[63] *Hill v. State*, 269 Ga. 23 (2) (494 SE2d 661) (1998) (evaluating alleged conflict of interest arising from defense counsel's previous representation of State's witness); see also *Hudson v. State*, 234 Ga. App. 895 (3) (a) (508 SE2d 682) (1998).

23. We find that the sentence of death in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor.[64] We also find, considering both the crime and the defendant, that the sentence of death was neither excessive nor disproportionate to the penalties imposed in similar cases.[65] The similar cases listed in the Appendix support the imposition of the death penalty in this case, as all are cases of intentional killing committed during the commission of an armed robbery or a motor vehicle hijacking.

Judgment affirmed. All the Justices concur, except Carley, J., who concurs in judgment only as to Division Six.

APPENDIX

Lee v. State, 270 Ga. 798 (514 SE2d 1) (1999); *Whatley v. State*, 270 Ga. 296 (509 SE2d 45) (1998); *Carr v. State*, 267 Ga. 547 (480 SE2d 583) (1997); *Bishop v. State*, 268 Ga. 286 (486 SE2d 887) (1997); *Jones v. State*, 267 Ga. 592 (481 SE2d 821) (1997); *McClain v. State*, 267 Ga. 378 (477 SE2d 814) (1996); *Green v. State*, 266 Ga. 439 (469 SE2d 129) (1996); *Crowe v. State*, 265 Ga. 582 (458 SE2d 799) (1995); *Mobley v. State*, 265 Ga. 292 (455 SE2d 61) (1995); *Christenson v. State*, 262 Ga. 638 (423 SE2d 252) (1992); *Meders v. State*, 261 Ga. 806 (411 SE2d 491) (1992); *Ferrell v. State*, 261 Ga. 115 (401 SE2d 741) (1991); *Stripling v.*

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[64] OCGA § 17-10-35(c)(1).

[65] OCGA § 17-10-35(c)(3).

State, 261 Ga. 1 (401 SE2d 500) (1991); *Cargill v. State*, 255 Ga. 616 (340 SE2d 891) (1986); *Ingram v. State*, 253 Ga. 622 (323 SE2d 801) (1984).

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

MARION WILSON, JR., Petitioner	)	CASE NO: 2001-V-38
v.	)	
WILLIAM TERRY, Warden, Georgia Diagnostic and Classification Prison, Respondent.	)	

FINAL ORDER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PURSUANT TO O.C.G.A. § 9-14-49

(Filed Dec. 1, 2008)

This matter comes before this Court on the Petitioner's Amended Petition for Writ of Habeas Corpus as to his convictions and sentence of death from his trial in the Superior Court of Baldwin County. Having considered the Petitioner's original and amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Answers to the original and amended Petitions, relevant portions of the appellate record, evidence admitted at the hearing on this matter on February 22-23, 2005, the documentary evidence submitted, the arguments of counsel, and the post-hearing briefs, this Court makes the following findings

of fact and conclusions of law as required by O.C.G.A. § 9-14-49. The Court denies the writ as to the Petitioner's convictions and as to the Petitioner's sentence of death.

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[1] **I. PROCEDURAL HISTORY**

Petitioner was tried before a jury October 27, 1997 through November 7, 1997 and convicted of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime and possession of a sawed-off shotgun.

(R. 13-15, 966). The jury found a requisite statutory aggravating circumstance and Petitioner was sentenced to death on November 7, 1997. (R. 964, 968).

On direct appeal, the Georgia Supreme Court found that the evidence at trial established the following facts:

> . . . on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts' automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three

notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline [2] cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts' automobile.

Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that

> Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. O.C.G.A. § 16-2-20(b)(3), (4). *See Mize v. State*, 269 Ga. 646(1) (501 S.E.2d 219) (1998); *Chapman v. State*, 263 Ga. 393 (435 S.E.2d 202) (1993); *Gambrel v. State*, 260 Ga. 197 (391 S.E.2d 406) (1990).

Wilson v. State, 271 Ga. 811, 812-813, 525 S.E.2d 339 (1999).

The record also shows that during the penalty phase of trial, the State introduced evidence that, in 1991, Petitioner had robbed and shot Luis Valle because Petitioner wanted to know what it felt like to shoot somebody, (Tr. T., pp. 2037-2038, 2056-2057, 2086-2092, 2106-2109), and in 1993 had shot Robert Underwood. (Tr. T., pp. 1916-1919, 1958-1961, 1970-1973). Both men survived. Additionally, the State introduced evidence showing: that Petitioner had shot a neighbor's dog for no reason, (Tr. T., pp. 1981, 1988-1993, 2026); Petitioner's juvenile convictions for arson

and criminal trespass, (Tr. T., pp. 2026-2029); Petitioner's fighting in school and assaulting a correctional officer at the Regional Youth Development Center, (Tr. T., pp. 2121-2125, 2139-2132 [sic]); Petitioner's possession of 22 bags of marijuana when Petitioner came to the Baldwin County Solicitor's office, where he was subsequently arrested, (Tr. T., pp. 2195-2207, 2238); and Petitioner's leading a group of men in a verbal confrontation against a group of college students during an incident on the local college campus, and when subsequently [3] asked by law enforcement to leave, Petitioner became belligerent, refused to leave, attempted to grab the officer's gun and had to be sprayed with pepper spray to subdue and arrest him. *Id.*

Petitioner's convictions and sentences were affirmed on November 1, 1999. *Wilson v. State*, 271 Ga. 811, 525 S.E.2d 339 (1999), *cert denied Wilson v. Georgia*, 531 U.S. 838 (2000). Petitioner filed his habeas corpus petition on January 19, 2001. Thereafter, an evidentiary hearing was held on February 22-23, 2005.

II. SUMMARY OF RULINGS ON PETITIONERS [sic] CLAIMS FOR HABEAS RELIEF

The Petitioner's Amended Petition enumerates thirteen claims for relief. Petitioner's claims have numerous subparts. As set out herein, this Court finds: (1) some grounds or portions of grounds asserted by Petitioner are procedurally barred, having been litigated on direct appeal of the original convictions and sentence; (2) some grounds or portions of grounds are

procedurally defaulted, the Petitioner having failed to raise the errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception; and (3) some grounds are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review. To the extent that Petitioner has failed to brief a claim, or has failed to present evidence in support of a claim, the claim is deemed abandoned and accordingly denied.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*

This Court finds that the following claims were rejected by the Georgia Supreme Court on direct appeal and thus may not be relitigated by means of a habeas corpus proceeding, (*Elrod* [4] *v. Ault*, 231 Ga. 750, 204 S.E.2d 176 (1974); *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986); *Roulain v. Martin*, 266 Ga. 353, 466 S.E.2d 837 (1996)):

> **Claim Three,** disproportionality of his death sentence, *Wilson*, 271 Ga. at 823-824(23);
>
> **Claim Four,** the death penalty in Georgia is imposed arbitrarily and capriciously, *Wilson*, 271 Ga. at 823-824(23);
>
> **Claim Five and Claim Seven, Paragraph D,** the denial of Petitioner's motion for change of venue, *Wilson*, 271 Ga. at 821-822(19);

Claim Seven, Paragraph A, the trial court's rulings as to the alleged biases of Jurors Peugh, Mayzes, Craig and those jurors who worked for or who had relatives who worked for the Department of Corrections, *Wilson*, 271 Ga. at 815-817(5);

Claim Seven, Paragraph E, empanelling persons on the jury that were employed by the Department of Corrections, *Wilson*, 271 Ga. at 816-817(5d);

Claim Seven, Paragraph F, the admission of Petitioner's gang involvement, photographs of the victim, statements made to law enforcement officers by Petitioner, and Petitioner's prior criminal history, *Wilson*, 271 Ga. at 813-823(2)(14)(15)(18)(20);

Claim Seven, Paragraph G, the admittance of evidence and arguments that Petitioner was a member of the FOLKS Gang and gang activity in general during the sentencing phase, *Wilson*, 271 Ga. at 813-814(2)(3);

Claim Seven, Paragraph J, the trial court allowing the introduction of crimes committed by Petitioner as a juvenile, his prior criminal activity, and testimony that Petitioner threatened to kill a man and his mother, *Wilson*, 271 Ga. at 822-823(20);

Claim Seven, Paragraph M, the trial court denying the defense motions for directed verdicts based on a claim of lack of evidence sufficient to support guilt and/or the statutory aggravating factors, *Wilson*, 271 Ga. at 813(1);

Claim Seven, Paragraph N, the trial court denying Petitioner's motion to suppress his taped statements to law enforcement, *Wilson*, 271 Ga. at 821(18);

Claim Seven, Paragraph P, the trial court's exclusion of exculpatory hearsay evidence during the guilt phase of trial, *Wilson*, 271 Ga. at 814-815(4);

[5] **Claim Seven, Paragraph Q,** the trial court not accompanying and supervising the jury during its view of the crime scene, *Wilson*, 271 Ga. at 817(6);

Claim Nine, the trial court's charge on "mere presence," *Wilson*, 271 Ga. at 817-818(7);

Claim Ten, challenge to the sentencing phase instructions, *Wilson*, 271 Ga. at 818-819 (11)(12)[1];

Claim Eleven, Paragraphs 92-94, remarks by the prosecution in its opening statement and closing arguments in both phases of trial, *Wilson*, 271 Ga. at 819-821(16)(17); and

Paragraph 95, the prosecution's introduction of evidence on gang activity, *Wilson*, 271 Ga. at 813-814(2).

As to Claim One, "actual innocence," Petitioner raised this same claim on direct appeal to the

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[1] To the extent, this claim raises a constitutional challenge to the sentencing hearing jury instructions not previously addressed on direct appeal by the Georgia Supreme Court, the claim is properly before this Court and is addressed on the merits below.

Georgia Supreme Court, arguing that he was not the triggerman and was merely present at the scene of the crimes. (*See* Petitioner's direct appeal brief, pp. 71-74). In rejecting this claim, the Georgia Supreme Court concluded:

> Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. [*Jackson v. Virginia, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30 (b) (2).*] The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. O.C.G.A. § 16-2-20(b)(3), (4). *See Mize v. State*, 269 Ga. 646(1) (501 S.E.2d 219) (1998); *Chapman v. State*, 263 Ga. 393 (435 S.E.2d 202) (1993); *Gambrel v. State*, 260 Ga. 197 (391 S.E.2d 406) (1990).

[6] *Wilson v. State*, 271 Ga. at 813.

Even if this Court were to determine that Petitioner's bare claim of actual innocence was not barred by res judicata, the claim would be noncognizable in

this habeas corpus proceeding. (*See Deyton v. Wanzer*, 240 Ga. 509, 510, 241 S.E.2d 228 (1978); *Coleman v. Caldwell*, 229 Ga. 656, 193 S.E.2d 846 (1972); *Herrera v. Collins*, 506 U.S. 390, 400-401 (1993) and *Moore v. Dempsey*, 261 U.S. 86 (1923)). Petitioner's proper avenue to assert his bare allegation of actual innocence would be in the trial court by properly filing an extraordinary motion for new trial. (*See Herrera*, 506 U.S. at 410-411, n. 11, citing O.C.G.A. § 5-5-41 (noting that Georgia has "state avenue open to process such a claim"; *Felker v. Turpin*, 83 F.3d 1303 (11th Cir. 1996) (noting that Georgia law, unlike a number of other states, permits motions for new trial on newly discovered evidence grounds and provides that the time for filing such motions can be extended)).

This Court also finds that Petitioner's claim that Mr. O'Donnell's wife's employment and her acquaintance with the victim was a conflict of interest is *res judicata, Wilson v. State*, 271 Ga. at 823.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

This Court finds that Petitioner failed to raise the following claims on direct appeal and further failed to establish cause and actual prejudice sufficient to excuse the procedural default of these claims in this collateral proceeding. Thus, these claims are procedurally defaulted and not reviewable by this Court, (*see Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985); *Valenzuela v. Newsome*, 253 Ga. 793, 325 S.E.2d 370 (1985);

O.C.G.A. § 9-14-48(d); *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991)):

> **Claim Six,** Petitioner was entitled to a bifurcated jury;
>
> [7] **Claim Seven, Paragraph A**, the trial court refused to strike certain jurors for cause, phrased its voir dire questions in a manner which suggested answers to jurors, engaged in improper voir dire, and allowed fair and impartial jurors to be struck for cause, excluding those jurors set forth above as *res judicata;*
>
> **Claim Seven, Paragraph B,** the trial court excused potential jurors for improper reasons;
>
> **Claim Seven, Paragraph C,** the trial court restricted voir dire;
>
> **Claim Seven, Paragraph H,** denial of funds to hire an expert sociologist to counter "gang evidence" and/or funds for a neurological examination to support testimony of Petitioner's expert, Dr. Kohanski;
>
> **Claim Seven, Paragraph I,** the trial court not giving charges on residual doubt and presumption of life sentencing;
>
> **Claim Seven, Paragraph K,** the trial court not requiring the State to disclose certain items of evidence in a timely manner;
>
> **Claim Seven, Paragraph L,** the trial court not requiring the State to disclose exculpatory or impeaching evidence;

Claim Seven, Paragraph M, the trial court not directing verdicts of acquittal or life sentence on its own motion;

Claim Seven, Paragraph O, trial court did not ensure Petitioner's statements to law enforcement were properly redacted;

Claim Seven, Paragraph Q, the jury failed to stay on the bus during its view of the crime scene;

Claim Seven, Paragraph S, the trial court failed to provide adequate funds for counsel to conduct a competent pretrial investigation and to secure the services of necessary experts and testing under *Ake v. Oklahoma*;

Claim Eight and footnote 9, misconduct on the part of jurors and error by the State and the trial court, insofar as they were aware of the juror misconduct;

Claim Nine, improper charges on the burden of proof, impeachment of witnesses, statutory terms and offenses charged in the indictment;

Claim Eleven, Paragraph 96, the prosecutor sought a sentence of death based solely on the argument that Petitioner fired the shot that killed the victim;

Claim Eleven, Paragraph 97, misleading argument and misconduct by the State;

[8] **Claim Twelve,** Georgia's Unified Appeal Procedure is unconstitutional; and

> **Claim Thirteen,** cumulative error, insofar as this is a cognizable claim, it is not only defaulted, but there is also no cumulative error rule in Georgia, *Head v. Taylor*, 273 Ga. 69, 70, 538 S.E.2d 416 (2000).

Further, as to Petitioner's prosecutorial misconduct claim, that the District Attorney changed theories of who was the triggerman in the trial of Petitioner and Co-Defendant Butts, this Court finds that Petitioner has failed to establish the requisite cause and prejudice to overcome his default of this claim. In fact, this Court notes that the record establishes that the District Attorney conceded that either Petitioner or Co-Defendant Butts was the triggerman during Petitioner's trial. (*See, e.g.*, Tr. T., pp. 1816, 1821, 1830, 1832, 1836, 1837-1838, 1839).

Further, this Court finds that Petitioner failed to establish his ineffective assistance of counsel allegation to support "cause" to overcome his default of this claim or any prejudice resulting from counsel's representation as trial counsel at the sentencing phase of trial: counsel introduced evidence from various witnesses that Co-Defendant Butts had claimed to be the triggerman, (Tr. T., pp. 2389, 2391-2392, 2394, 2396-2398, 2401, 2403-2404); called Co-Defendant Butts to testify, who invoked his Fifth Amendment right to silence, (Tr. T., pp. 2384-2387); and, in the sentencing phase closing argument, repeatedly argued that Co-Defendant Butts was the person that had actually shot Donovan Parks. (Tr. T., pp. 2487-2488, 2499, 2501, 2505, 2506). Trial counsel also argued to the jury that

the District Attorney had conceded the point that Petitioner may not have pulled the trigger, (Tr. T., p. 2499), and that the Sheriff had stated, on the tape recorded statement that the jury had heard, that Co-Defendant Butts shot Donovan Parks. (Tr. T., pp. 2500, 2504).

[9] Further, as to Petitioner's claim of prosecutorial misconduct regarding the prosecutor's arguments at sentencing, this Court finds that Petitioner has failed to establish cause and prejudice to overcome his default of this claim as the prosecutor's arguments during the sentencing phase that Petitioner had killed Donovan Parks, after Petitioner had been found guilty of malice murder, were legally correct. Further, even if the prosecutor's argument had been misleading, this Court determines that, in light of the District Attorney's numerous concessions during his arguments at the guilt phase of Petitioner's trial as to who was the triggerman and in light of the evidence introduced as to Petitioner's guilt and in aggravation, Petitioner would be unable to show cause and prejudice to overcome his default of this claim.

Petitioner also raises a claim of conflict of interest in that Mr. O'Donnell represented Petitioner during trial, after Mr. O'Donnell had been offered a position by the Attorney General's Office as a Special Assistant Attorney General. As Mr. O'Donnell withdrew from Petitioner's case after trial, did not represent Petitioner on direct appeal and as appellate counsel was aware of Mr. O'Donnell's acceptance of the position of a SAAG

at the time of the direct appeal, (HT 237-238), Petitioner could have raised this claim of conflict of interest on direct appeal.

This Court further finds that Petitioner has failed to establish cause or any prejudice to overcome his default of this claim as Petitioner failed to allege, much less prove, that there was an actual conflict, (*Lamb v. State*, 267 Ga. 41, 42, 472 S.E.2d 693 (1996), citing *Hamilton v. State*, 255 Ga. 468, 470, 339 S.E.2d 707 (1986); *Smith v. White*, 815 F.2d 1401, 1404 (11th Cir. 1987)) or that he was adversely impacted by Mr. O'Donnell's impending employment. (*See, e.g.*, HT 526, 5411-5412 (Mr. O'Donnell's testimony that accepting a position as a SAAG did not affect his representation of Petitioner); HT 226-227 (co-counsel's testimony that he "saw Mr. O'Donnell just living and breathing this case;" "he was totally immersed in this case.")).

[10] **C. INEFFECTIVE ASSISTANCE OF COUNSEL**

Petitioner alleges numerous claims of ineffective assistance of trial and appellate counsel. As Petitioner was represented by the same counsel at trial and on appeal, making it impossible for counsel to raise claims of ineffective assistance of counsel, these claims are properly before this Court for review. *See Thompson v. State*, 257 Ga. 387, 359 S.E.2d 664 (1987); *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991).

Standard of Review

In *Strickland v. Washington, 466 U.S. 668 (1984)*, the United States Supreme Court adopted a two-pronged approach to reviewing ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687. *See also Smith v. Francis*, 253 Ga. 782, 325 S.E.2d 362 (1985). *See also Wiggins v. Smith*, 539 U.S. 510 (2003) (reaffirming the *Strickland* standard as governing ineffective assistance of counsel claims); *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).*" (O'Connor, J., concurring)).

The Court in *Strickland* also instructed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [11] defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citations omitted). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690; *accord Smith v. Francis*, 253 Ga. at 783; *see also Zant v. Moon*, 264 Ga. 93, 97, 440 S.E.2d 657 (1994).

As the Georgia Supreme Court recognized, the parameters set forth by the United States Supreme Court for considering ineffective assistance claims are to "address not what is prudent or appropriate, but only what is constitutionally compelled." *Zant v. Moon*, 264 Ga. at 95-96, quoting *Burger v. Kemp*, 483 U.S. 776, 780, 107 S.Ct. 3114 (1987). "The test for reasonable attorney performance 'has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.'" *Jefferson v. Zant*, 263 Ga. 316, 318, 431 S.E.2d 110 (1993).

Counsel's Experience

Petitioner was represented at trial by Tom O'Donnell and Phillip Carr, both of whom had extensive criminal experience prior to Petitioner's trial. (HT 204-206, 441, 445, 4504, 5343-5344). Although Mr. O'Donnell, at the time of Petitioner's trial, had never been lead counsel through the entirety of a death penalty trial, he had worked with a very experienced death penalty attorney in fully preparing a death penalty case for trial, in which the defendant pled guilty immediately prior to trial. (HT 443, 447, 5344). Although Petitioner argues that these two men were not qualified to represent him at trial according to certain guidelines, this Court finds that, regardless of counsel's experience, Petitioner has the burden of establishing that counsel were [12] deficient and that their deficient representation prejudiced Petitioner. This Court finds that Petitioner has failed to carry that burden.

Guilt/Innocence Phase

Actual Innocence Claim

The record establishes that trial counsel introduced evidence to attempt to support Petitioner's defense of mere presence. (*See, e.g.*, Tr. T., pp. 1336-1338, 1366-1368, 1372,1382-1383,1385-1386) (witness testimony that Petitioner may not have been inside Wal-Mart and testimony that Co-Defendant Butts, not Petitioner, was seen talking to the victim); Tr. T., pp. 1585-1589, 1607-1608 (Petitioner's own statements alleging mere presence); Tr. T., pp. 1787-1800 (trial

counsel's attempts to introduce testimony of inmates who would allegedly testify that Co-Defendant Butts had claimed to be the triggerman)). At the close of the evidence, trial counsel moved for directed verdicts on malice murder and armed robbery, which were denied, (Tr. T., pp. 1781-1782, 1786-1787), and repeatedly argued in closing that Petitioner was merely present at the scene of the crime and did not know Co-Defendant Butts was going to commit any of the crimes. (Tr. T., pp. 1843-1873). Counsel also raised this same issue on direct appeal, which was denied. (Petitioner's direct appeal brief, pp. 71-74).

The Court notes that the majority of the testimony on which Petitioner relies to support his actual innocence claim before this Court was presented at Petitioner's trial. (*See* Petitioner's post-hearing brief, pp. 7-9, citing to the trial transcript). However, even after hearing this same evidence, the jury recommended a sentence of death. This Court finds that trial counsel were not deficient or Petitioner prejudiced by the counsel not submitting the additional evidence that Petitioner alleges trial counsel should have been presented at the guilt phase of his trial. (*See* Tr. [13] T., pp. 2515-2516; HT 3357, 3375, 3382, 3397; HT 3378, juror comments: "There wasn't any question that he was guilty.", HT 3393, "Evidence was overwhelming.").

Specifically, with regard to the testimony of Gary Garza, Horace Mays and Shawn Holcomb, which was ruled inadmissible by the trial court, (Tr. T., pp. 1800-1801), this Court finds that Petitioner failed to establish that counsel were deficient or that Petitioner was

prejudiced by counsel not requesting a ruling as to the admissibility of their testimony based on *Turner v. State*, 267 Ga. 149, 476 S.E.2d 252 (1996). The defense team interviewed these three inmates, believed the inmate witnesses had "credibility issues," (HT 504-506, 3157, 3171, 4569-4570, 4582, 5365-5370, 5374-5374 [sic], 5447-5459; Tr. T., pp. 2403-2404), and felt the witnesses would be hard to control on the stand. (HT 504). This Court finds that based on these factors that trial counsel would not have been able to meet the exception circumstances of *Turner* required for the admission of such testimony.

Further, even pretermitting the lack of deficiency, this Court finds that Petitioner failed to establish ineffective assistance of counsel as he failed to establish the requisite prejudice. The record establishes that these witnesses would have undermined Petitioner's mere presence defense as Mr. Mays would have also testified that Co-Defendant Butts had stated that Petitioner was in control of the events on the night of the murder, including ordering the victim out of the car, (HT 5359, 5454, 5459), and as Mr. Garza would have testified that Petitioner stood outside Wal-Mart to detain the victim and was the person who ordered the victim to stop the car, (HT 5459), clearly showing Petitioner as a party to the crime. Also, the Court notes that trial counsel were able to submit this same testimony through their investigator during the sentencing phase of trial. Thus, this Court finds that counsel were not deficient or Petitioner prejudiced.

[14] As to Rafael Baker, trial counsel spoke to Mr. Baker prior to trial and Mr. Baker told trial counsel that neither Petitioner nor Co-Defendant Butts mentioned a murder or shooting someone on the night of the murder. (HT 3169, 3051, 3054, 5358-5359, 5445). Accordingly, trial counsel were not deficient for not calling Mr. Baker to testify to evidence he expressly denied to trial counsel prior to trial. As to Mr. Baker's claim that he attempted to talk to defense counsel, but they would not talk to him, (HT 771), Mr. Baker's testimony is belied by Mr. Carr's testimony in which Mr. Carr testified, live before this Court with undeniable certainty, that neither Mr. Baker nor anyone else approached trial counsel with information in the days leading up to the trial. (HT 215-216). Further establishing that Petitioner failed to show deficiency or any resulting prejudice with regard to trial counsel's decision not to attempt to elicit testimony from Mr. Baker that Co-Defendant Butts was the triggerman, is the fact that Mr. Baker's roommate, who could have been called by the State in rebuttal, had previously stated that Mr. Baker made statements to him that implicated Petitioner in the murder and as the leader of crimes. (*See* HT 3172). In view of these facts and the above findings concerning Mr. Baker and as Mr. Baker's current affidavit testimony is merely cumulative of other testimony proffered at trial, or is otherwise contradicted by trial counsel, (*see* HT 215-216), Petitioner has failed to show that counsel were deficient or that he was prejudiced.

Trial counsel also spoke to Felicia Ray prior to trial, discussed whether to call her at trial and made a strategic decision not to utilize her testimony. (HT 5361-5362). Although Petitioner claims that Ms. Ray could have described Petitioner as "relaxed" while Co-Defendant Butts was inside Wal-Mart, this Court finds that counsel were not deficient in not presenting this evidence and that this evidence would not have, in reasonable probability changed the outcome of trial, particularly in light of the fact that the jury also witnessed Petitioner on videotape at the gas [15] station immediately after the murder of Mr. Parks, behaving in the same "relaxed" manner. (Tr. T., p. 1446).

Trial counsel also spoke to Angela Johnson prior to trial, (HT 3474-3475, 3477, 3478-3483, 3485, 5376), and made a reasonable strategic decision not to call her as a witness because they felt she could not help Petitioner's case, as she would have testified that Petitioner had stated that he "owned the gang" and would have undermined Petitioner's mere presence defense, (HT 5377), she had a "credibility problem, (HT 218), and they recognized that she would not have made a good witness since she had her own pending charges. (HT 3235, 5375-5378, 4524). The record establishes that although Ms. Johnson stated that Co-Defendant Butts brought the shotgun over to her home, (HT 5462), her statement also established that Petitioner **and** Co-Defendant Butts chose Donovan Parks as their victim. (HT 5462). Trial counsel's decision not to call Ms. Johnson as a witness in either phase of trial was

reasonable and Petitioner was not prejudiced. (HT 4524-4525, 5377).

Plea Negotiations

As trial counsel worked under the assumption that Petitioner's case was going to trial, pursued plea negotiations, repeatedly conferred with Petitioner and urged him to accept the State's plea offer of two life sentences, which trial counsel procured for Petitioner, (HT 512, 3318, 3332), and as Petitioner, fully informed and on his own accord, refused the offers, (*see* HT 463, HT 512-517), trial counsel were not deficient and Petitioner was not prejudiced by trial counsels' representation.

Change in Presiding Judges

Petitioner failed to show deficiency or prejudice by the mere substitution of judges prior to the beginning of his trial.

[16] **Jury View**

This Court finds that Petitioner failed to establish deficiency or prejudice in counsel not objecting to the trial judge being absent from the jury view of the crime scene as trial counsel and the State consulted and agreed upon the procedure to be employed, trial counsel and Petitioner attended the jury view by following the bus in separate vehicles, trial counsel interviewed the jurors following the conclusion of Petitioner's trial

and asked a number of them about the jury view, and there was no indications from the answers of the jurors who attended the view that anything improper had occurred. (*See, e.g.*, HT 3373, 3388 (interview notes of jurors)).

Counsel's Closing Argument

This Court finds that trial counsel were not deficient or Petitioner prejudiced by trial counsel's guilt phase closing argument as they reasonably argued Petitioner's mere presence at the scene of the crime and thus, his alleged innocence of murder. (*See* Tr. T., pp. 1843-1873).

Guilt Phase Charges

As the trial court's charge on reasonable doubt was proper, (Tr. T., pp. 1877-1879; *See* Suggested Pattern Jury Instructions), Petitioner failed to establish any deficiency or prejudice with regard to this claim.

Sentencing Phase

Dispute as to Responsibilities of Trial Counsel

At the habeas hearing, testimony was given by Petitioner's trial counsel. Philip Carr testified first, and in his testimony he stated he and his co-counsel (O'Donnell) "split duties" in preparing for trial. (HT 252). He further stated "I did some work on the issue of mitigation. . . ." (HT 252) and "there were phases I

was involved in more so than others. I was not involved in as [17] much of the mitigation stage . . . " (HT 253). When asked who was responsible for the mitigation evidence, Carr stated: "Mr. O'Donnell. And then he would give me assignments that I would take." (HT 253). When O'Donnell was asked who was responsible for going out and investigating Petitioner's background, he stated "that is what I had Mr. Thrasher and Mr. Carr do." (HT 456). His testimony was that Carr was to do "both the investigation in Glynn County and everything else." (HT 457).

On the surface, it appears there was confusion between counsel as to who was responsible for investigating and preparing mitigation evidence, specifically Petitioner's family background. The question raised by this apparent confusion is whether the result was a failure to investigate because of miscommunication and inattention, and whether this rendered counsel's performance constitutionally deficient. See e.g., *Terry v. Jenkins*, 280 Ga. 341 (2006); *Schofield v. Gulley*, 279 Ga. 413 (2005). When considering this testimony in context, however, the Court finds no such deficiency. As lead counsel, O'Donnell had Carr and the investigator report to him. (HT 457). He received daily reports from them while they were in Glynn County, and monitored their progress. (HT 458). Counsel spoke with Petitioner's mother, father, and girlfriend. (HT 475-476). They also interviewed, or attempted to interview, a number of other witnesses. (See e.g., HT 474-486, 456, 495). There is no indication of a haphazard investigation, nor of a lack of sharing of information between

counsel. *Schofield*, at p. 414. Any miscommunication which may have occurred did not result in a lack of preparation of mitigating evidence. *Terry*, at p. 344. Counsel made a reasonable investigation into Petitioner's family background, and reasonable decisions as to what evidence to prepare and present, consistent with their defense strategy. (HT 251). The Court finds no deficiency in counsel's performance in this [18] regard, nor was Petitioner prejudiced in any way, given the particular facts and circumstances of the case.

Trial Counsel's Pretrial Investigation into Petitioner's Background

As Petitioner denied his guilt of the crimes and as the defense and mitigation theory was mere presence, defense counsel's preparation for the mitigation case actually began in the investigation and preparation for the guilt phase of Petitioner's trial. *See Chandler v. United States*, 218 F.3d 1305, 1320 n.27 (11th Cir. 2000) ("At least when guilt in fact is denied, a 'lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase,'" citing *Darden v. Wainwright*, 477 U.S. 168 (1986); *Lockhart v. McCree*, 476 U.S. 162 (1986)).

This Court further finds that Petitioner's defense counsel conducted a reasonable investigation of Petitioner's background by interviewing and speaking with Petitioner, (HT 466, 4523), and interviewing Petitioner's mother to obtain a social history of Petitioner.

(HT 218-219, 475, 5388). However, Petitioner's mother was uncooperative and did not want to testify at trial, (HT 5388), and despite counsel's numerous interviews with Petitioner himself, Petitioner did not provide counsel with the names of any of his family members. (HT 4534). In fact, Petitioner told trial counsel, when asked about family members to contact, that he had no contact at all with his father's side of family. (HT 225-226). "That they never wanted him anyway and nobody would even just acknowledge he existed." *Id.*

"One of the circumstances that bears upon the reasonableness of an investigation is the information supplied by counsel's own client. Just as information supplied by the defendant may point to the need for further investigation, the lack of information supplied may also indicate that [19] further investigation would be unnecessary or fruitless." *Waldrop v. Thigpen*, 857 F. Supp. 872, 915 (S.D. Ala. 1994), citing *Mulligan v. Kemp*, 771 F.2d 1436 (11th Cir. 1985). "A client's failure to disclose information to his attorney, as well as his refusal to assist the attorney, necessarily must be considered in assessing the reasonableness of the investigation performed by counsel." *Waldrop v. Thigpen*, 857 F. Supp. at 915. "Counsel must undertake enough of an investigation to be able to reasonably advise his client about the advantages and disadvantages of further investigation." *Id.* n.30, citing *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991).

Further, this Court finds that, notwithstanding the fact that Petitioner did not provide counsel with

the names of his family members and although Petitioner's mother was uncooperative and did not want to testify, trial counsel still interviewed witnesses, (*see* HT 3474-3486), attempted to contact potential witnesses, (*see generally* HT 456, 495, 3082-3108; Tr. T. 1189-1192, 1498-1506, 1333-1338, 1352-1360,1339-1351,1382-1383,1395-1414, 1363-1390, 1482-1485, 1417, 1423-1426, 5390), and hired Dr. Maish, a psychologist, to investigate and evaluate Petitioner's background. (HT 454-456, 5431). Trial counsel testified that in addition to speaking with Petitioner and his mother, they also spoke with Petitioner's father, Marion Wilson, Sr., and another man. (HT 458). They also attempted to talk to someone at DJJ and at the college Petitioner had attended. (HT 475, 476). Counsel testified the defense team tried to locate and talk to witnesses, but in addition to having trouble finding these witnesses, the witnesses trial counsel were able to find were more devastating than helpful to Petitioner's case. (HT 223).

Additionally, trial counsel requested numerous files regarding Petitioner's background, including: the files from various law enforcement agencies concerning Petitioner and/or his co-defendant, (HT 3109, 3115, 3121, 3122, 3125, 3127, 3110, 3114, 3120, 3124, 3126); [20] employment records, (HT 3111, 3129, 3132, HT 3153); institutional records from the Division of Youth Services, (HT 3112); Georgia Department of Corrections Records, (HT 3113); Petitioner's school records from numerous academic institutions, including the Georgia Military College, (HT 3116, 3119, 3123, 3131,

3128); Petitioner's medical records from various hospitals, (HT 3117, 3130, 3134); and Petitioner's records from the Georgia Vital Records Service (HT 3118). Trial counsel received many of these requested files. (*See, e.g.*, HT 3139-3152, HT 3319-3320).

Trial counsel also hired Dr. James Maish to conduct a psychological evaluation, to present Petitioner's background, and to act as a "substitute for a sociologist." (HT 456; *see also* HT 3510). However, after Dr. Maish had evaluated Petitioner, had learned the defense theory, and Petitioner's social history, (HT 4508-4510), trial counsel made the reasonable strategic decision not to call Dr. Maish to testify. Dr. Maish was specifically asked not to write a report until after Mr. O'Donnell spoke with Dr. Maish because he was afraid it would be discoverable. (HT 509). Trial counsel testified that, after Dr. Maish's evaluation of Petitioner, Dr. Maish said he did not want to testify "because if he testified, and this is a summary, that he would have to say that Marion was a sociopath." (HT 5381).

Trial counsel also retained Dr. Renee Kohanski, a forensic psychiatrist. (HT 3327-3329). Dr. Kohanski examined Petitioner twice, consulted with trial counsel, reviewed records, and consulted with a "psychologist/attorney." (HT 3331, 5061-5062; Tr. T., p. 2437). Trial counsel "discussed anything that could be mitigating" with Dr. Kohanski, (HT 210-211), interviewed her and explained Petitioner's history to her. (HT 201-211). Dr. Kohanski testified that she also reviewed records,

which included psychological service records from Petitioner's elementary school, Petitioner's social history, a special education placement committee report concerning [21] Petitioner from 1986, a psychological report from 1986 concerning Petitioner, Petitioner's Georgia Regional Savannah Hospital records from 1992 and information relevant to Petitioner's current charges, including witness statements, incident reports "and such." (Tr. T., p. 2415). Further, Dr. Kohanski's testimony from trial establishes that she conducted review of Petitioner's background as discussed below. Dr. Kohanski ultimately testified at trial and provided information to the jury regarding Petitioner's background for mitigation purposes, including his neglectful home life, lack of supervision as a child, and Petitioner having no adult authority figure. (Tr. T., p. 2414; HT 5066). This Court finds that trial counsel were not deficient by trial counsel's investigation of Petitioner's background.

This Court also finds that, in light of the evidence presented by trial counsel at sentencing, the facts of the crime and the evidence presented by the State as to Petitioner's guilt and in aggravation of sentence, Petitioner was not prejudiced by trial counsel's investigation of Petitioner's background.

Additional Testimony of Lay Witnesses.

Petitioner claims that defense counsel failed to interview certain potential mitigation witnesses. However, this Court finds that trial counsel were not

deficient in not submitting this additional testimony and further finds that Petitioner has not established prejudice as the testimony proffered in support of this claim would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial. (*See Chandler v. U.S.*, 218 F.3d 1305, 1318 (11th Cir. 2000) (no requirement that counsel do certain acts to be found effective (for example, interviewing some of Petitioner's neighbors or attempting to interview all of Petitioner's immediate family members); *see also Head v. Carr*, 273 Ga. 613, 626, 544 S.E.2d 409 (2001) (in which the [22] Georgia Supreme Court held that the habeas petitioner could not show actual prejudice with regard to mitigating evidence that trial counsel had allegedly failed to elicit from specific witnesses as most of the alleged mitigating information was presented to the jury through other witnesses); *DeYoung v. State*, 268 Ga. 780, 786 (5), 493 S.E.2d 157 (1997) ("Not ineffective for failing to put up cumulative evidence")).

As the Eleventh Circuit noted in *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995), "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." *Id.* at 1513-1514. Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the

opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." *Id.* at 1514. "With all of the resources and time they have devoted to the case, this squad of attorneys has succeeded in proving the obvious: if [trial counsel] had their resources and the time they have been able to devote to the case, he could have done better." *Williams v. Head*, 185 F.3d 1223, 1236 (11th Cir. 1999).

As to the testimony of Petitioner's former teachers, this Court finds this evidence speculative and notes the limited contact these teachers had with Petitioner and/or the lapse in time between their contacts with Petitioner and the crimes. (HT 277, 292-295). Thus, while the testimony of Petitioner's former school teachers, including Ms. Gray's testimony, would have been largely cumulative of other evidence at trial, (Compare HT 284, 287 with Tr. T., pp. 2416-2418), or otherwise inadmissible on evidentiary grounds, even assuming its admissibility, the Court finds that Petitioner has failed to show that trial counsel were deficient in not submitting [23] this testimony or that the testimony would have a reasonable probability of changing the outcome of the case.

As to Eric Veal, (HT 767-769), given the speculative nature of this testimony, it would not have been admissible at trial. Further, even assuming the admissibility of the testimony, this Court finds that Mr. Veal's testimony would not have, with any reasonable probability, changed the outcome of Petitioner's trial.

This Court also finds that the remainder of Petitioner's lay affiants, like the aforementioned affiants, provide testimony that would not have been admissible at trial as the testimony is largely based on hearsay or speculation or was cumulative of testimony elicited by defense counsel from Petitioner's mother and Dr. Kohanski at trial concerning Petitioner's childhood. (*See generally* Tr. T., pp. 2412-2454). Further, given the defense theory that Butts was the triggerman, trial counsel were reasonable in declining to proffer the testimony that undermined that defense, (*see Mitchell v. Kemp*, 762 F.2d 886, 888-890 (11th Cir. 1985); *Burger v. Kemp*, 483 U.S. 776, 794-795 (1987) ("It appears that he [i.e. trial counsel] did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty."), and there is no reasonable probability that such additional testimony would have changed the outcome of the case. (*See Head v. Carr*, 273 Ga. 613, 626, 544 S.E.2d 409 (2001) (wherein the Georgia Supreme Court found no prejudice by counsel not submitting cumulative mitigating evidence through additional witnesses); *Turpin v. Mobley*, 269 Ga. at 641 ("We conclude beyond a reasonable doubt that the limited additional mitigation evidence concerning Mobley's childhood presented at the evidentiary hearing would not have changed the outcome of Mobley's trial.")).

[24] **Preparation of Dr. Kohanski.**

Trial counsel hired Dr. Kohanski on July 22, 1997. (HT 3327-3329). Counsel felt that Dr. Kohanski had experience in dealing with "these kind of cases" as an expert. They interviewed Dr. Kohanski, discussed possible mitigation in the event of conviction, informed her of Petitioner's history, gave her documents and records for review and asked for advice and "discussed anything that could be mitigating." (HT 210-211). Further, as set forth above, Dr. Kohanski examined Petitioner, consulted with trial counsel and consulted with a "psychologist/attorney." (HT 3331, 5061-5063, 5322; Tr. T., p. 2437). This Court further finds that as Dr. Kohanski never informed trial counsel that further information was needed to complete her evaluation, (HT 5383, 5053), but, instead, informed trial counsel that they had "truly provided an excellent defense; exploring every single option available to you." (HT 3332), trial counsel's preparation of Dr. Kohanski was not deficient and Petitioner was not prejudiced. (*See Head v. Carr*, 273 Ga. at 631 (It is not reasonable to put the onus on trial counsel to know what additional information would have assisted a hired expert as "a reasonable lawyer is not expected to have a background in psychiatry or neurology."). This Court also finds that Petitioner's current diagnoses of impaired frontal lobe functioning, which allegedly affects Petitioner's impulsivity and reasoning, and ADHD, would not, if testified to at trial, in light of the facts of this case and the aggravating circumstances presented, in reasonable

probability have changed the outcome of Petitioner's trial.

Counsel's Sentencing Phase Presentation

In the sentencing phase of trial, still attempting to show that Co-Defendant Butts was more culpable than Petitioner, defense counsel recalled Sheriff Howard Sills, (Tr. T., p. 2329), who testified that he took a statement from Co-Defendant Butts and that the "gist of that [25] statement" was Co-Defendant Butts denied he was involved in the murder and armed robbery and only acknowledged that he returned from Macon, Georgia with his uncle and Petitioner. *Id.* Sheriff Sills testified that Co-Defendant Butts made several other denials, which were clearly lies. (Tr. T., p. 2331). Trial counsel also had Co-Defendant Butts' statement played for the jury, (Tr. T., pp. 2336-2378), and, thereafter, through the testimony of Sheriff Sills pointed out inconsistencies and untruths from Co-Defendant Butts' statement, including his involvement in the crimes and his membership in the FOLKS Gang. (Tr. T., pp. 2337-2340, 2348, 2369, 2364, 2374-2376).

Trial Counsel also called Co-Defendant Butts to testify and questioned him about his alleged statements to inmates that he was the triggerman in the murder of Donovan Parks. (Tr. T., pp. 2384-2387). As trial counsel expected, Co-Defendant Butts repeatedly invoked his Fifth Amendment right to silence.

Trial counsel also called Captain Russell Blenk of the Baldwin County Sheriff's Office who testified, in

great detail, concerning Co-Defendant Butts' alleged claims to inmates that Butts was the triggerman. (Tr. T., pp. 2389, 2391-2392).

Trial counsel also called their detective, William Thrasher, (Tr. T., p. 2394), who testified that he previously worked with the Milledgeville Police Department and the Police Officer's Standards and Training Council. (Tr. T., pp. 2394-2395). Mr. Thrasher testified that he was working on Petitioner's case and as part of the investigation he had spoken to Gary Garza, Shawn Holcomb and Horace May, (Tr. T., pp. 2396-2397), and all three informed Mr. Thrasher that Co-Defendant Butts had told them that Butts had shot Donovan Parks. (Tr. T., pp. 2397, 2398, 2401, 2403-2404).

[26] Defense counsel also called Doctor Kohanski, (Tr. T., p. 2412), who testified that she had been qualified as an expert in the area of forensic psychiatry approximately thirty to forty times in the State of Georgia, (Tr. T., p. 2413), and that she had evaluated Petitioner's competency to stand trial and his background for mitigating circumstances. (Tr. T., p. 2414). She testified that she reviewed numerous records concerning Petitioner's background. (Tr. T., p. 2415) Dr. Kohanski told the jury that Petitioner was born three weeks late, one week beyond what is considered normal. (Tr. T., p. 2416). She testified that there were early difficulties, including severe respiratory infections, pneumonia at ages one, three and four, bronchitis and possible sickle cell disease. *Id.* Trial counsel had Dr.

Kohanski testify that Petitioner began to have difficulties in the first grade. (Tr. T., pp. 2415-2416). She testified that the school had identified inappropriate aggressive behavior and conducted their own assessment. (Tr. T., p. 2416). According to Dr. Kohanski, the school found that Petitioner was having difficulty staying on task, had a poor self-image, excessive maternal dependence and the school requested a further medical evaluation to see if there might be some medical cause for Petitioner's behavior. (Tr. T., p. 2416). However, she testified, that the medical evaluation was never conducted, (Tr. T., pp. 2417-2419), because Petitioner's mother failed to follow through on these recommendations. *Id.*

According to Dr. Kohanski, following the school evaluation, it was believed that Petitioner was suffering from attention deficit hyperactive disorder, but no one ever followed through on that disorder. (Tr. T., p. 2417). Dr. Kohanski also testified that other complications were noted by the school, including that Petitioner came from an "extraordinarily chaotic home-life," that his parents were not together, that he lived in a difficult neighborhood and a difficult environment. (Tr. T., p. 2417-2418). She also testified that Petitioner's mother was Caucasian and his father was African American and that Petitioner had an identity conflict because he was [27] neither white nor black. (Tr. T., p. 2418). She told the jury that Petitioner's mother provided "little, if any, supervision" in the home and that Petitioner was "basically on his own from age nine on up, on the street." (Tr. T., p. 2418). Dr. Kohanski

told the jury that there was no male supervision in the home and that the boyfriends of Petitioner's mother that "came and went, frequently used drugs" and Petitioner's mother denied to Petitioner that any drug use was going on even though he tried to explain to her that the men in their home were using drugs. (Tr. T., p. 2418). Dr. Kohanski testified that Petitioner "had no support in the home; had no guidance; was on the street from age ten" and that his guidance came from "the individuals roaming the streets" whom, she testified, gave little guidance to anyone. (Tr. T., p. 2418). By age nine or ten, Petitioner was on the streets fending for himself with "no structure, no support, no family guidance, nothing." *Id.*

Dr. Kohanski testified that Petitioner's public school records demonstrated that Petitioner continued to have difficulty as he was easily distracted, had a short attention span, was constantly moving and impulsive. (Tr. T., p. 2418). She testified that this diagnosis was consistent with attention deficit hyperactive disorder. *Id.* She also testified that the records noted that Petitioner was "having a difficult time with peers." *Id.*

Dr. Kohanski testified that the records also showed that Petitioner had a chaotic home environment without any male role model. (Tr. T., p. 2419). She testified that the only father figure Petitioner had was a gentleman who was in a common law marriage with his mother and who was "behaving in extremely dangerous ways," including holding a gun to his mother's head when Petitioner was approximately six or seven

years old. (Tr. T., p. 2419). Dr. Kohanski testified that this type of violence "was not an uncommon event in that household." *Id.*

[28] Dr. Kohanski testified that maternal dependence meant that he was "very, very attached to his mom." (Tr. T., p. 2420). She testified that Petitioner's mother could do no wrong in Petitioner's eyes. *Id.*

Dr. Kohanski testified that, with Petitioner's background, he should never have gone to college or had success in college. (Tr. T., p. 2421).

Dr. Kohanski testified that when Petitioner was sent to Central State Hospital during his incarceration, he was put on antidepressants. (Tr. T., p. 2422). She again testified as to the conflict with Petitioner's color being white when Petitioner considers himself to be African-American. (Tr. T., pp. 2422-2423).

Additionally, through Dr. Kohanski, trial counsel tried to undermine the State's gang evidence by testifying that Petitioner then sought a family that he did not have, gang life, which "provided a family for him that he did not have" "like a police brotherhood, only the brotherhood is the street brotherhood." (Tr. T., p. 2420). She testified that in the gang "they fend for each other; they take care of each other; they have laws that guide each other; they have the structure, something which Marion did not have." (Tr. T., p. 2420).

Trial counsel next called Charlene Cox, Petitioner's mother to testify on Petitioner's behalf, (Tr. T.,

p. 2441-2442), and had prepared Ms. Cox for her testimony, (HT 220). She testified that Dr. Kohanski's testimony, which she had sat in the courtroom and heard, was an accurate reflection of Petitioner's life in that Petitioner had a difficult time with his identity, that Petitioner's father had nothing to do with him since he was born, and that he had not had any sort of male guidance throughout his entire life. (Tr. T., pp. 2442-2443, 2444-2445). She also asked the jury to spare Petitioner's life so that he could be with his 18-month-old daughter for her own sake. (Tr. T., p. 2445, 2446).

[29] In the sentencing phase closing argument trial counsel argued that Petitioner was not the triggerman, (Tr. T., pp. 2487-2488, 2499-2501, 2504-2506), deserved mercy, and attempted to undermine the evidence regarding the aggravating circumstances, including Petitioner's shooting of Jose Valle and Roy Underwood, the gang evidence, and his prior shooting of a dog. (Tr. T., pp. 2489-2490, 2491-2496). This Court finds that trial counsel's sentencing phase presentation was not deficient.

Further, with regard to the affidavit and witness evidence Petitioner presented to this Court as additional potential mitigating evidence, this Court finds that, even if this evidence had been admissible at trial, there is no reasonable probability that the outcome of the trial would have been different given: (1) the limited nature of the additional, admissible, non-cumulative portions of Petitioner's potentially mitigating testimony; (2) the overwhelming evidence of Petitioner's guilt, including: his statements to law

enforcement officers; evidence that Petitioner and Co-Defendant Butts had taken the victim's car after shooting the victim and stopped to purchase gasoline, where Petitioner was observed by witnesses and videotaped by a security camera inside the service station; evidence that Petitioner and Co-Defendant Butts then drove to Atlanta where they contacted Petitioner's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile; evidence that Petitioner and Co-Defendant Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire; and evidence that a sawed-off shotgun was found at Petitioner's residence that was loaded with the type of ammunition used to kill the victim, (*see Wilson*, 271 Ga. at 812-813); and (3) the evidence in aggravation that was presented to the jury, including: testimony that Petitioner had robbed and shot Jose Valle in 1991, because Petitioner wanted to know what it felt like to shoot somebody, (Tr. T., pp. 2037-2038, 2056-2057, 2086- [30] 2092, 2106-2109); testimony that Petitioner had previously shot Robert Underwood in 1993, (Tr. T., pp. 1916-1919, 1958-1961, 1970-1973); testimony regarding Petitioner's arrest for possession of drugs, (Tr. T., pp. 1994-2009); testimony that Petitioner had previously shot a neighbor's dog for no reason, (Tr. T., pp. 1981, 1988-1993, 2026); evidence regarding Petitioner's juvenile convictions for arson and criminal trespass, (T. 2026-2029); evidence of Petitioner making a death threat, (Tr. T., p. 2048); and evidence of Petitioner's fighting in school and assaulting a correctional

officer at the Regional Youth Development Center. (Tr. T., pp. 2121-2125, 2139-2132 [sic]).[2]

Gang Evidence

Petitioner alleges that trial counsel were ineffective in not objecting to or being able, in some manner, to have the evidence regarding Petitioner's involvement in the FOLKS Gang and evidence concerning the FOLKS Gang excluded from the sentencing phase of Petitioner's trial. This Court finds that the Georgia Supreme Court found this evidence was relevant and admissible in Petitioner's trial. *Wilson v. State*, 271 Ga. at 814. Therefore, as to relevancy, this [31] Court finds that Petitioner cannot establish deficiency or prejudice under the *Strickland* standard and his claim fails. *See also Butts v. State*, 273 Ga. 760, 768-769, 546 S.E.2d 472 (2001) *citing, Strickland*, 466 U.S. at 687 and *Dawson v. Delaware*, 503 U.S. 159 (1992).

Further supporting the finding that trial counsel were not deficient and Petitioner not prejudiced are

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[2] The Court finds the facts of the instant case to be distinguishable from the far more compelling facts of *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) and *Hall v. McPherson*, 284 Ga. 219 (2008). In these two cases, trial counsel failed to locate or to follow up on documentary red flags which would have led to a wealth of mitigating evidence. Additionally, in *McPherson*, trial counsel also failed to interview McPherson's brother, a Georgia prison inmate and the key witness to McPherson's horrific childhood. *Id.* at 222-223. In the instant case, the Court finds even had counsel presented the above-referenced witnesses at trial or located the documents Petitioner claims that counsel failed to obtain, the result of Petitioner's sentencing trial would not have been different.

the facts that: prior to trial, trial counsel filed a motion in limine to redact gang references from Petitioner's statement for, at least, the guilt phase of trial, (HT 519-520); in his statement to law enforcement, Petitioner made it clear that he was a member of a gang, was the "Goddamn chief enforcer" of the gang, (HT 222); and trial counsel's investigation supported Petitioner's gang involvement. (HT 222, 224, 498).

This Court further finds that as to the sentencing phase closing argument, trial counsel had no choice but to concede that Petitioner was in a gang and made a reasonable strategic decision to argue in an attempt to undermine Petitioner's gang involvement, as well as arguing mercy, Petitioner's background, Petitioner's defense that he had not been the triggerman and attempting to undermine the State's aggravating evidence. This Court also finds that Petitioner was not prejudiced, particularly when contrasted with the State's evidence in aggravation and the horrendous facts of the crime.

Petitioner also asserts that trial counsel were ineffective for not objecting to the testimony of Ricky Horn and Sheriff Sills as inadmissible based on alleged lack of expertise and inaccuracies. However, this Court finds that Detective Horn qualified as an expert on gangs in Baldwin County. The record establishes that Detective Horn had worked for the Sheriff's Department for 16 years and had been in law enforcement for approximately 20 years. (HT 67). He was very well acquainted with the entire county and its residents. (HT

68). He had also been "collecting intelligence and information" on gangs in Baldwin County for approximately seven [32] years, had collected information from other law enforcement agencies throughout the State, including officers with Baldwin County and the Georgia Bureau of Investigation, (Tr. T., pp. 2284-2285, 1891), attended seminars, read periodicals from law enforcement, (*id.*), and conducted his own independent study, including interviewing informants, gang members in Baldwin County and one former FOLKS Gang member from Chicago. (Tr. T., pp. 2285, 2316; HT 37, 39-40, 71-73, 1890, 1893). As found by the Georgia Supreme Court, (*Butts v. State*, 273 Ga. at 769), Detective Horn easily qualified as an expert on the gangs in Baldwin County. This Court finds that Petitioner failed to establish deficiency or prejudice with regard to trial counsel not objecting to Detective Horn's qualifications or his testimony.

Further, this Court finds that trial counsel were not deficient or Petitioner prejudiced by trial counsel not objecting to the small portion of Sheriff Sills' testimony that Petitioner argues was inadmissible as it was merely cumulative of Ricky Horne's admissible testimony. (Tr. T., pp. 2287-2288, 2296, 2295, 2286).

Regarding hearsay evidence submitted by these witnesses, the Court notes that " an expert . . . may base his opinion on hearsay. The presence of hearsay does not mandate the exclusion of the testimony; rather, the weight given the testimony is a question for the jury." *Cheek v. Wainwright*, 246 Ga. 171, 174 (3), 269 S.E.2d 443 (1980). *See also Roebuck v. State*, 277

Ga. 200, 202, 586 S.E.2d 651 (2003). Accordingly, Petitioner has failed to show counsel were deficient. Further, this Court finds, that based on the law and the specific facts of this case, (HT 54-56, 103-104, 108-109; Tr. T., pp. 2249-2251), including Petitioner's own expert and Petitioner acknowledgment that gang members commit crimes to elevate their status, (HT 143, 178), Petitioner has failed to establish prejudice.

[33] At trial, Sheriff Sills and Detective Horn testified that Petitioner was reportedly the leader of the FOLKS Gang in Baldwin County, which they learned from collective law enforcement in the community and informants. (Tr. T., pp. 2273, 2296; HT 110-111, 1817). Detective Horn also testified that there were other sets of FOLKS in Baldwin County with a different leader. (Tr. T., p. 2299). Further, the record before this Court establishes that in an April 15, 1996 statement to his defense team, Petitioner stated he was a "G," the "leader of a set" and the "highest ranking 'G' in Milledgeville." (HT 3071). Petitioner also stated in his statement to law enforcement that he was as high as he could be and could not get any higher within the gang, (Tr. T., p. 2250), and most damaging to his own case is Petitioner's emphatic declaration to law enforcement officers that he was the "Goddamn chief enforcer" of the FOLKS Gang in Baldwin County. (HT 222). Further, during the course of the defense investigation, the defense team learned that Petitioner was the highest "G" in the FOLKS Gang in Milledgeville. (HT 498-499), This Court finds that counsel were not deficient and Petitioner was not prejudiced by trial

counsel not attempting to discredit Ricky Horn's testimony that Petitioner was a leader of the FOLKS Gang in Baldwin County as Petitioner failed to establish that Detective Horn's testimony was inaccurate and/or misleading in any manner. (*See also* HT 122, 224 2246, 2302-2303, 2315, 4436-4438).

As to the accuracy of Detective Horn's testimony concerning how many individuals were in the FOLKS Gang in Baldwin County, this Court finds that Petitioner failed to show deficiency or prejudice, as Detective Horn repeatedly testified before both the trial court and this Court, that the Sheriff's Department's system identified suspected gang members, but did not identify all the gang members in the area. (HT 41, 42-43, 89-90, 93, 1902; Tr. T., pp. 2297, 2306). He further testified that he and others in law enforcement still thought 300 was a conservative number. (HT [34] 43, 89-90; *see also* HT 171, 175-176, 177, 179-180 (Petitioner's habeas gang expert's testimony corresponding to Horn's testimony)).

As to other criminal acts by gang members, this Court finds that counsel were not deficient or Petitioner prejudiced by trial counsel not objecting or attempting to rebut the testimony of Sheriff Sills and Detective Horn that there were a number of crimes committed in Baldwin County, not necessarily in the capacity of the FOLKS Gang, but people involved in the FOLKS Gang. (Tr. T., pp. 2276, 2294). Detective Horn testified that it would be hard to prove how many

crimes were committed by gang members in furtherance of that gang, (Tr. T., pp. 2314-2315), which was also conceded by Dr. Hagedorn. (HT 171).

With regard to counsel not objecting to the specific incidences regarding the jogger and the dry cleaning murder, this Court finds that Petitioner failed to establish deficiency or prejudice as Petitioner was not tied to these incidents by the testimony of Sheriff Sills or Ricky Horn at Petitioner's trial. The testimony was only that these were gang related crimes, and that Petitioner was a part of a gang, not necessarily that set of the gang. (HT 107, 114-115, 116; *see also Jackson v. State*, 272 Ga. 191, 192, 528 S.E.2d 232 (2000)). Therefore, this Court finds that Petitioner failed to establish deficiency or prejudice with respect to trial counsel not objecting or attempting to rebut this evidence.

Further, as to the testimony of Sheriff Sills and Detective Horn that gang members commit crimes to elevate their status within the gang, this Court finds that Petitioner not only failed to show that this testimony was inaccurate, but Petitioner, in his post-arrest statement, conceded this point as did Dr. Hagedorn. (*See, e.g.*, HT 54-56, 103-104, 108-109, 178; Tr. T., pp. 2249-2251). *See also Jackson v. State*, *supra* (in which the defendant admitted to robbing store, in which he killed the victim, and told officers that he did this to elevate his ranking in his [35]street gang.")). Accordingly, trial counsel were not deficient or Petitioner prejudiced by trial counsel not attempting to discredit this testimony.

As to Petitioner's claim that trial counsel were ineffective for not objecting to Detective Horn's testimony that the FOLKS acronym stands for "Followers of Lord King Satan," this Court finds that Petitioner failed to establish that trial counsel were deficient or Petitioner prejudiced as Petitioner did not show that Detective Horn's testimony was inaccurate. (HT 4417). In fact, Detective Horn testified before this Court that he obtained the acronym "Followers of Lord King Satan" from literature he had garnered that was written by gang members, (*see, e.g.*, HT 77, 79, 4417) and probably from seminars. (HT 46, 49, 75-76). Further, both Detective Horn and Petitioner's expert, Dr. Hagedorn, testified that the FOLKS acronym may stand for something different in Milledgeville than it does in Chicago. (HT 49, 147, 199; *see also* Petitioner's gang notebooks which notes "Forever Our Love Kill Slobs" (Tr. T., pp. 2644, 2668, 2681, 2706).

As to the testimony that gangs in Milledgeville wear colors, this Court finds that Petitioner failed to establish deficiency or prejudice in trial counsel's representation as Petitioner failed to show that this information is inaccurate. (*See, e.g.*, HT 524).

Obtaining an Expert

Petitioner has failed to establish that trial counsel's decision to rely on their psychiatrist, Dr. Renee Kohanski, to rebut the State's gang evidence was deficient or that Petitioner was prejudiced by trial counsel

not hiring a gang expert to testify at trial. Mr. Carr testified that they did not consider getting their own gang expert, (HT 254), but chose to have Dr. Kohanski testify that the gang was the only family structure Petitioner had and why this was his family structure based on his background. (HT 223). He further testified that he did not feel there was anything [36] to be gained by hiring a gang expert other than Dr. Kohanski. (HT 254). In fact a review and comparison of the testimony of Petitioner's newly hired gang expert with the testimony presented at trial shows that trial counsel were not deficient or Petitioner prejudiced by trial counsel making the strategic decision not to hire a gang expert, but to rely on Dr. Kohanski, as Dr. Hagedorn's testimony was, in large part, cumulative of the testimony of Dr. Kohanski and the State's Witness, Ricky Horn. (*See, e.g.*, HT 138, 143, 151, 171, 178-180). This Court finds that the limited additional testimony that Petitioner presented to this Court would not have, in reasonable probability, changed the outcome of Petitioner's trial.

Also supporting the denial of Petitioner's ineffective assistance claim with regard to hiring a gang expert is the fact that Dr. Hagedorn only spoke to Petitioner once over the telephone, (HT 190), conceded he could not testify "with any certainty about the gang situation in Milledgeville," (HT 164), that he had not "done the research here," (HT 164), did not contest that Petitioner said that he was the chief enforcer of the gang, nor Petitioner's declaration that Petitioner could not get any higher within the gang, (HT 179), and,

although testifying that "chief enforcer" is not a particularly high rank, (HT 165), he conceded that a term in Chicago could "likely" mean something different in Milledgeville. (HT 199).

Thus, this Court finds that trial counsel were not deficient nor Petitioner prejudiced by trial counsel making a reasonable strategic decision not to hire a defense expert on gangs in addition to the testimony offered by Dr. Kohanski.

Investigative Support

Petitioner had two extremely experienced attorneys working on his case, along with a psychiatrist, a psychologist, an investigator, and a paralegal. (HT 452; 4/11/97 *Ex Parte* Hearing Tr., pp. 8-9; R. 25-27). Petitioner also sought, but was denied, funds for an evaluation by a [37] sociologist. (R. 33-34; 4/11/97 *Ex Parte* Hearing Tr., pp. 8-9). Instead of hiring a sociologist, defense counsel hired Dr. James Maish to conduct a psychological evaluation, to present Petitioner's background, and essentially to act as a "substitute for a sociologist," (HT 456; *see also* HT 3510) and Dr. Renee Kohanski, a psychiatrist, to testify at trial concerning mitigation, Petitioner's background and competency. (HT 5054). As part of her examination, Dr. Kohanski informed Mr. O'Donnell that she would conduct a social history, although it would be a cursory one. (HT 5100).

At the time of trial, Petitioner gave defense counsel no reason to believe additional testing was necessary. Petitioner had obtained his GED, (Tr. T., p. 2428),

and attended the Georgia Military College in 1994-1995, where he obtained above-average grades. (HT 1085-1086). Petitioner was also able to assist in his defense at trial, (*see* HT 152, 216-217, 3459-3466, 5346), and assist counsel on appeal. (*See* HT 3451-3458). Further, Dr. Kohanski did not diagnosis Petitioner with ADHD, (HT 5072), found Petitioner was competent, knew right from wrong, did not act under any delusional compulsion, (Tr. T., p. 2424), found that Petitioner's I.Q. was "at least within the average range of intelligence," (Tr. T., p. 2429), and that Petitioner did not have a history of organic brain damage. (Tr. T., p. 2427; HT 5067). Thus, this Court finds that counsel reasonably declined to request additional funds from the trial court. *See Holladay v. Haley*, 209 F.3d 1243, 1250 (11th Cir. 2000) ("counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems."), citing *Bertolotti v. Dugger*, 883 F.2d 1503, 1511 (11th Cir.1989); *see also Baldwin v. Johnson*, 152 F.3d 1304, 1314 (11th Cir. 1998) (decision not to pursue psychological testing reasonable when petitioner appeared normal to counsel), *cert. denied*, 526 U.S. 1047 (1999); *Stephens v. Kemp*, 846 F.2d 642, 653 (11th Cir. 1988).

[38] This Court also finds, as set forth above, that had additional testing been conducted and revealed Petitioner's current diagnoses of impaired frontal lobe functioning, which allegedly affects Petitioner's impulsivity and reasoning, and ADHD, these diagnoses and

testimony concerning the diagnoses would not in reasonable probability have changed the outcome of Petitioner's trial.

State's Opening Statement and Closing Statement

This Court finds that trial counsel were not deficient and Petitioner was not prejudiced by trial counsel not objecting to the state's statements and arguments concerning gang evidence as those statements and arguments were all reasonable inferences supported by the evidence submitted at trial and thus, were not improper. (*See e.g.*, *Morgan v. State*, 267 Ga. 203, 203-204, 476 S.E.2d 747 (1996); *Spivey v. State*, 253 Ga. 187, 191(4), 319 S.E.2d 420 (1984)).

This Court finds that trial counsel were not deficient and Petitioner was not prejudiced by trial counsel not objecting to the arguments concerning Petitioner's demeanor and lack of remorse as a defendant's lack of remorse is a "permissible area of inquiry and argument during the sentencing phase of a capital trial." *Carr v. State*, 267 Ga. 547, 559(8)(d), 480 S.E.2d 583 (1997).

This Court finds that trial counsel were not deficient and Petitioner was not prejudiced by trial counsel not objecting to the prosecutor's reference to a Biblical verse, (Tr. T., p. 2484), as the prosecutor did not use a quote from the Bible to urge that the Bible required that Petitioner be sentenced to death. *See Greene v. State*, 266 Ga. 439, 449, 469 S.E.2d 129 (1996); *Pace v. State*, 271 Ga. 829(32)(g), 524 S.E.2d 490 (1999).

This Court finds that Petitioner failed to show deficiency or prejudice as to counsel's representation, concerning the State allegedly: commenting on Co-Defendant Butts not giving a [39] statement, Petitioner's silence, injecting the victim's character or asking the jury to put themselves in the place of the victim. Moreover, this Court notes that counsel previously raised these same claims on direct appeal and the Georgia Supreme Court rejected the basis of Petitioner's claims regarding the State allegedly injecting the victim's character, (*Wilson*, 271 Ga. 819-820(16)(a)), and asking the jury to put themselves in place of the victim. (*Wilson*, 271 Ga. 819-820(16)(b)). As to the remaining allegations, the Georgia Supreme Court concluded that these statements "did not in reasonable probability change the result of [Petitioner's] trial." (*Wilson*, 271 Ga. 820(16)(d)(alleged comment on Petitioner's right to silence and Butts' failure to give a statement)).

Trial Counsel's Sentencing Phase Closing Argument

This Court finds that trial counsel were not deficient and Petitioner not prejudiced by trial counsel's sentencing phase closing argument as trial counsel presented a cohesive and well-reasoned sentencing phase closing argument by arguing that Petitioner was not the triggerman, (Tr. T., pp. 2487-2488, 2499-2501, 2505-2506); by attempting to undermine the aggravating evidence, (Tr. T., p. 2489-2494); and arguing Petitioner's chaotic home life and background, (Tr. T., pp.

2491-2494), in an attempt to mitigate Petitioner's sentence.

Remainder of Petitioner's Ineffective Assistance of Counsel Claims

As to the remainder of Petitioner's ineffective assistance of counsel claims, including, *inter alia*, Petitioner's claims that counsel were deficient and he was prejudiced by counsel not: filing certain pretrial motions to exclude and/or prepare for gang evidence; having Petitioner's statements suppressed or further redacted; ensuring a proper voir dire of the jury; having aggravating evidence of prior assaults excluded; requesting jury instructions on unadjudicated aggravating circumstances; arguing disproportionality of Petitioner's sentence; challenging lethal [40] injection; challenging the non-bifurcated trial; raising juror misconduct claims; challenging the Unified Appeal Procedure; and researching circumstantial evidence law, this Court finds that Petitioner has failed to establish the requisite deficiency or prejudice with regard to any of Petitioner's ineffective assistance of counsel claims.

D. SENTENCING PHASE JURY INSTRUCTIONS

Petitioner's claims concerning the trial court's sentencing phase instructions are properly before this Court as such claims cannot be procedurally defaulted. *Head v. Hill*, 277 Ga. 255, 265, 587 S.E.2d 613 (2003).

This Court finds that the trial court's charge concerning the definition of mitigating circumstances was proper, (*see* Tr. T., pp. 2508-2511), as the jury need not be instructed as to specific standards for considering mitigating circumstances so long as the jury is allowed and instructed to consider the evidence in mitigation and is instructed that it has a discretion, notwithstanding proof of aggravating circumstances, to impose a life sentence. *McClain v. State*, 267 Ga. 378, 386(6), 477 S.E.2d 814 (1996); *Peek v. State*, 784 F.2d 1479 (11th Cir. 1986), *en banc*; *Spivey v. State*, 241 Ga. 477, 481, 246 S.E.2d 288 (1978). Petitioner's claim is denied.

This Court finds that the trial court properly charged the jury that their sentencing phase verdict must be unanimous. *See, e.g., Harris v. State*, 263 Ga. 526, 528(6), 435 S.E.2d 669 (1993). "Although a pre-deliberation charge on unanimity is proper, informing the jury in such a charge of the consequences of a failure to achieve unanimity is disapproved." *Id.* In fact, such a charge is not a proper statement of the law as any verdict returned by the jury as to sentence must be returned unanimously. *See Tharpe v. State*, 262 Ga. 110, 416 S.E.2d 78 (1992). Petitioner's claim is denied.

[41] Petitioner has argued, in very general terms that the instructions regarding the definitions of sentences was so ambiguous it should have been objected to by trial counsel. This Court finds that the trial court's charge, (*See* Tr. T., pp. 2511-2513), was adequate and unambiguously defined each sentencing option in

direct accordance with Georgia law. (*See* O.C.G.A. § 17-10-16; O.C.G.A. § 17-10-31.1). Petitioner's claim is denied.

IV. DISPOSITION

This Court hereby DENIES Petitioner's habeas corpus petition in its entirety. The clerk is instructed to serve this order on all counsel of record and habeas clerk for the Council of Superior Court Judges.

This 25th day of Nov., 2008.

/s/ Edward D. Lukemire
EDWARD D. LUKEMIRE
Judge of Superior Court sitting by designation in Butts County Superior Court

[SEAL] SUPREME COURT OF GEORGIA
Case No S09E0796

Atlanta, May 03, 2010

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

MARION WILSON, JR. v. WILLIAM TERRY, WARDEN From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 2001V38

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

MARION WILSON, JR., Petitioner, vs. CARL HUMPHREY, Warden, Respondent.	:	CIVIL ACTION NO. 5:10-CV-489 (MTT)

ORDER

(Filed Dec. 19, 2013)

MARION WILSON, JR. was sentenced to death for the murder of Donovan Corey Parks. He petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Although he alleges numerous errors on the part of the state courts that considered his various claims, his principal contention is that he would not have been sentenced to die if his trial attorneys had competently investigated his background and used the information gained from that background investigation to present an effective mitigation defense. Specifically, he argues that if the jury had heard from various teachers, social workers, and other background witnesses and if his attorneys had armed their mental health experts with this background information, the jury likely would not have found that he should be executed. This Court agrees that the conduct of Wilson's trial attorneys with regard to their investigation and presentation of mitigation evidence is difficult to

defend. But even assuming his lawyers' performance was deficient, it is clear to this Court that Wilson cannot prove he was prejudiced. That is because the Court is satisfied that there is not a reasonable probability that, but for his lawyers' errors, the result of his trial would have been different.

For this and many other reasons discussed in detail below, Wilson's petition is **DENIED**.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Facts

The Georgia Supreme Court summarized the facts of this case in Wilson's direct appeal:

> [O]n the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing

the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon

> where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.

Wilson v. State, 271 Ga. 811, 812-13, 525 S.E.2d 339, 343 (1999), *overruled in part by O'Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008).

B. Procedural history

On November 5, 1997, a jury found Wilson guilty of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. (Doc. 8-9 at 90).[1] He was sentenced to death for the crime of malice murder, and the Georgia Supreme Court affirmed his conviction and sentence on November 1, 1999. (Doc. 8-9 at 88); *Wilson*, 271 Ga. at 812, 525 S.E.2d at 343.

Wilson filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on January 19, 2001. (Doc. 11-4). After conducting an evidentiary hearing, the state habeas court denied relief in an order dated November 25, 2008. (Docs. 12-5 to 12-8; 18-4).

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[1] Because all documents have been electronically filed, this Order cites to the record by using the document number and electronic screen page number shown at the top of each page by the Court's CM/ECF software.

On December 17, 2010, Wilson filed a Petition for Writ of Habeas Corpus by a Person in State Custody in this Court. (Doc. 1). The Respondent filed his answer, and the Court denied Wilson's motions for discovery, a stay, and an evidentiary hearing. (Docs. 7, 28, 37, 39). Both parties have now briefed the issues. (Docs. 43, 44, 47).

II. STANDARD OF REVIEW

A. Exhaustion and procedural default

Procedural default bars federal habeas relief when a habeas petitioner has failed to exhaust state remedies that are no longer available or when the state court rejects the habeas petitioner's claim on independent state procedural grounds. *Frazier v. Bouchard*, 661 F.3d 519, 524 n.7 (11th Cir. 2011); *Ward v. Hall*, 592 F.3d 1144, 1156-57 (11th Cir. 2010).

There are two exceptions to procedural default. If the habeas respondent establishes that a default has occurred, the petitioner bears the burden of establishing "cause for the failure to properly present the claim and actual prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice." *Conner v. Hall*, 645 F.3d 1277, 1287 (11th Cir. 2011) (citing *Wainwright v. Sykes*, 433 U.S. 72, 81-88 (1977); *Marek v. Singletary*, 62 F.3d 1295, 1301-02 (11th Cir. 1995)). A petitioner establishes cause by demonstrating that some objective factor external to the defense impeded his efforts to raise the claim properly in the state courts. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) (quoting *Henderson v.*

Campbell, 353 F.3d 880, 892 (11th Cir. 2003)). A petitioner establishes prejudice by showing that there is a reasonable probability that the result of the proceedings would have been different. *Id.* To the extent the state court's cause and prejudice findings are based upon determinations of fact, those factual findings are presumed to be correct and can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Regarding what is necessary for a petitioner to establish a fundamental miscarriage of justice, the Eleventh Circuit has stated:

> To excuse a default of a guilt-phase claim under [the fundamental miscarriage of justice] standard, a petitioner must prove "a constitutional violation [that] has probably resulted in the conviction of one who is actually innocent." To gain review of a sentencing-phase claim based on [a fundamental miscarriage of justice], a petitioner must show that "but for constitutional error at his sentencing hearing, no reasonable juror could have found him eligible for the death penalty under [state] law."

Hill v. Jones, 81 F.3d 1015, 1023 (11th Cir. 1996) (citations omitted).

B. Claims that were adjudicated on the merits in the state courts

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides the standard of review.[2]

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[2] Wilson complains that the state habeas court "adopt[ed] nearly verbatim the State's proposed findings of fact and conclusions

This Court may not grant habeas relief with respect to any claim that has been adjudicated on the merits in state court unless the state court's decision was (1) contrary to clearly established Federal law; (2) involved an unreasonable application of clearly established Federal law; or (3) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2); *see also Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). The phrase "clearly established Federal law" refers to the holdings of the United States Supreme Court that were in existence at the time of the relevant state court decision. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions." *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (citing *Williams*, 529 U.S. at 404-05).

> Under § 2254(d)(1), "[a] state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [the United States Supreme Court's] cases' or if it 'confronts a set of facts that are materially indistinguishable from a

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of law." (Doc. 43 at 19). Wilson does not allege that AEDPA deference should not apply to the state habeas court's order and both Supreme Court and Eleventh Circuit precedent provide that deference is still required. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) (citing *United States v. Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964)); *Rhode v. Hall*, 582 F.3d 1273, 1281 (11th Cir. 2009); *Brownlee v. Haley*, 306 F.3d 1043, 1067 n.19 (11th Cir. 2002).

> decision of [the United States Supreme] Court and nevertheless arrives at a [different] result. . . .'"

Michael v. Crosby, 430 F.3d 1310, 1319 (11th Cir. 2005) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003)).

A state court's decision involves an "unreasonable application" of federal law when "'the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or when it unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context.'" *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (quoting *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011)). An "unreasonable application" and an "incorrect application" are not the same:

> We have explained that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Indeed, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable. This distinction creates a substantially higher threshold for obtaining relief than *de novo* review. AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.

Renico v. Left, 559 U.S. 766, 773 (2010) (citations and quotation marks omitted).

Pursuant to 28 U.S.C. § 2254(d)(2), district courts can "grant habeas relief to a petitioner challenging a state court's factual findings only in those cases where the state court's decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Price v. Allen*, 679 F.3d 1315, 1320 (11th Cir. 2012) (quoting 28 U.S.C. § 2254(d)(2)). A state court's determination of a factual issue is "presumed to be correct," and this presumption can only be rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. WILSON'S CLAIMS[3]

A. Claims that are procedurally defaulted

1. Trial counsel's conflict of interest

Wilson claims that his defense suffered because his lead trial counsel, Thomas O'Donnell,[4] continued to

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[3] Wilson initially submitted a brief consisting of 266 pages and later filed a reply brief consisting of 98 pages. (Docs. 43, 47). He states that he "does not abandon any of his other claims not . . . addressed [in his briefs], but relies instead on factual and legal arguments contained in the petition itself and in briefing before the state courts . . . " (Doc. 43 at 10). This Court addresses in detail only those claims that Wilson addresses in his two briefs. "[M]ere recitation in a petition, unaccompanied by argument, in effect forces a judge to research and thus develop supporting arguments – hence *litigate* – on a petitioner's behalf. Federal judges cannot litigate on behalf of the parties before them, and it is for this reason that any claims in [Wilson's] petition that were not argued in his brief are abandoned." *Blankenship v. Terry*, 2007 WL 4404972 at *40 (S.D. Ga.), *aff'd*, 542 F.3d 1253 (11th Cir. 2008) (citations omitted).

[4] O'Donnell testified that he started working on Wilson's case on April 9, 1996. (Doc. 12-8 at 29). On May 27, 1997, J. Phillip

represent him after O'Donnell accepted a job as a Special Assistant Attorney General to handle Department of Family and Children Services ("DFCS") cases. (Doc. 12-8 at 57). When he accepted the job in the summer of 1996, O'Donnell informed the Attorney General's office that he could not begin work until Wilson's trial was over. (Doc. 12-8 at 57). Although O'Donnell testified that he thought his acceptance of this job offer was common knowledge, the record does not reveal when he first disclosed this information to Wilson or to the trial court.

During the December 15, 1998 hearing on Wilson's motion for new trial, O'Donnell advised the trial court:

> [T]his should complete my – my time with Mr. Wilson. As I pointed out to the Court before I started the trial in the Death Penalty case having to do with Mr. Wilson, because I was appointed Special Attorney General. I am not comfortable, but the Court can instruct me about the fact that since I am a Special Attorney General, I actually when I file this appeal, it will be directly against the Attorney General's Office. . . . [T]here is disagreement between the parties about whether I am actually disqualified or not. . . . I want some guidance from the Court.

Carr replaced a lawyer who was removed from the defense team for health reasons. (Doc. 8-1 at 41). Carr is now a felon. In March 2007, he was sentenced to serve 25 years in prison for four counts of child molestation. (Doc. 25-5). Carr's license to practice law was suspended on June 4, 2007. *In re Carr*, 282 Ga. 138, 646 S.E.2d 252 (2007).

(Doc. 10-10 at 73). The trial court asked Wilson if he wanted O'Donnell to continue representing him, and Wilson, with some equivocation, said he did. (Doc. 10-10 at 74).

O'Donnell then asked the Office of the Attorney General whether he could represent, at trial or on appeal, a defendant facing the death penalty. In a letter dated December 17, 1998, the Attorney General's office made clear that O'Donnell's representation of Wilson presented a problem.

> Our office has consistently advised Special Assistants that they were not to handle such cases due to the potential for a conflict of interest and the appearance of impropriety that would arise. We are concerned about the trial of the proceedings because the trial attorney may very well be a witness in a habeas corpus proceeding which our office will handle and that would put that attorney in a position potentially adverse to our office. The appellate process presents an equally difficult situation because our office files briefs in all murder appeals and would therefore be filing a brief in opposition to someone who is a Special Assistant employed by this office. Thus, when we retain Special Assistants, it is with the understanding that they will not handle these types of cases. While a court might not find a legal conflict in a given case, the potential for a conflict is too much risk to take in a death penalty action.

(Doc. 16-13 at 56). On February 8, 1999, the trial court removed O'Donnell as counsel "due to a conflict with the Attorney General's office." (Doc. 10-11 at 4). Carr continued to represent Wilson on appeal, and John H. Bradley was appointed co-counsel. (Doc. 10-11 at 4).

Wilson first raised this conflict-of-interest claim in the state habeas action. That court found the claim procedurally defaulted:

> As Mr. O'Donnell withdrew from Petitioner's case after trial, did not represent Petitioner on direct appeal and as appellate counsel was aware of Mr. O'Donnell's acceptance of the position of a [Special Assistant Attorney General] at the time of the direct appeal, Petitioner could have raised this claim of conflict of interest on direct appeal.
>
> This Court further finds that Petitioner has failed to establish cause or any prejudice to overcome his default of this claim as Petitioner failed to allege, much less prove, that there was an actual conflict . . . or that he was adversely impacted by Mr. O'Donnell's impending employment.

(Doc. 18-4 at 11) (citations omitted).

Because the state habeas court found the claim was procedurally barred, this Court cannot review the claim on the merits unless Wilson can establish cause and prejudice or a fundamental miscarriage of justice. Wilson has not pointed to any factor external to the defense that prevented him from raising this claim on direct appeal. *See Spencer*, 609 F.3d at 1180. Nor has

he provided evidence that the state habeas court's finding of no prejudice is incorrect. *See Greene*, 644 F.3d at 1154 (explaining that when a state court finds insufficient evidence to establish cause and prejudice, this court presumes the state court's findings are correct unless rebutted by clear and convincing evidence). Finally, Wilson has not shown that failure to review the claim would result in a fundamental miscarriage of justice. Thus, Wilson's claim that his defense suffered because of O'Donnell's alleged conflict of interest is procedurally defaulted.

2. Prosecutorial misconduct

Wilson states that he is entitled to a new sentencing hearing because the prosecutor unconstitutionally and unethically switched its theory of who actually shot Parks in his and Butts's trials to impose death sentences on each of them. (Doc. 43 at 234). Wilson first raised this issue in his state habeas petition. The state habeas court held:

> [A]s to Petitioners prosecutorial misconduct claim, that the District Attorney changed theories of who was the triggerman in the trial of Petitioner and Co-Defendant Butts, this Court finds that Petitioner has failed to establish the requisite cause and prejudice to overcome his default of this claim. In fact, this Court notes that the record establishes that the District Attorney conceded that either Petitioner or Co-Defendant Butts was the triggerman during Petitioner's trial.

Further, this Court finds that Petitioner failed to establish his ineffective assistance of counsel allegation to support "cause" to overcome his default of this claim or any prejudice resulting from counsel's representation as trial counsel at the sentencing phase of trial: counsel introduced evidence from various witnesses that Co-Defendant Butts had claimed to be the triggerman, called Co-Defendant Butts to testify, who invoked his Fifth Amendment right to silence, and, in the sentencing phase of the closing argument, repeatedly argued that Co-Defendant Butts was the person that had actually shot Donovan Parks. Trial counsel also argued to the jury that the District Attorney had conceded the point that Petitioner may not have pulled the trigger, and that the Sheriff had stated, on the tape recorded statement that the jury had heard, that Co-Defendant Butts shot Donovan Parks.

Further, as to Petitioner's claim of prosecutorial misconduct regarding the prosecutors arguments at sentencing, this Court finds that Petitioner has failed to establish cause and prejudice to overcome his default of his claim as the prosecutors arguments during the sentencing phase that Petitioner had killed Donovan Parks, after Petitioner had been found guilty of malice murder, were legally correct. Further, even if the prosecutor's argument had been misleading, this Court determines that, in light of the District Attorney's numerous concessions during his arguments at the guilt phase of Petitioner's trial as to

> who was the triggerman and in light of the evidence introduced as to Petitioner's guilt and in aggravation, Petitioner would be unable to show cause and prejudice to overcome his default of this claim.

(Doc. 18-4 at 10-11) (record citations omitted).

Wilson contests the finding of procedural default and argues that it would have been impossible for him to raise the prosecutorial misconduct claim in the trial court because he was convicted approximately one year prior to Butts's trial. (Doc. 43 at 237). Respondent concedes that the issue could not have been raised at trial, but maintains it should have been raised in Wilson's direct appeal. (Doc. 44 at 142). Wilson was convicted and sentenced in November 1997; his motion for new trial was filed on December 3, 1997 and supplemented on December 10, 1998; a hearing on the motion for new trial was held on December 15, 1998; the trial court denied the motion on December 18, 1998; and Wilson's direct appeal to the Georgia Supreme Court was docketed on February 3, 1999. (Docs. 8-9 at 88-90, 94, 104-06, 108; 10-10 at 1-76); *Wilson*, 271 Ga. at 812 n.1, 525 S.E.2d at 343 n.1. Butts was convicted on November 20, 1998 and sentenced on November 21, 1998. *Butts v. State*, 273 Ga. 760, 761 n.1, 546 S.E.2d 472, 477 n.1 (2001). Thus, Wilson could have raised the issue of prosecutorial misconduct in his direct appeal.[5]

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[5] Respondent does not maintain that Wilson could have raised the issue in his motion for new trial. However, Butts's trial had ended before Wilson filed the supplement to his motion for new trial on December 10, 1998.

Wilson argues that the default should be set aside because he can show either cause and prejudice or that there has been a fundamental miscarriage of justice. (Doc. 43 at 237 n.115). Wilson claims the ineffective assistance of his appellate counsel establishes cause. The state habeas court found that Wilson had not shown cause and prejudice. To determine if this finding was based on a reasonable determination of the facts, the Court looks at the record that appellate counsel had at the time of Wilson's appeal. *See Dell v. United States*, 710 F.3d 1267, 1274 (11th Cir. 2013).

Transcripts from Wilson's trial reveal that the prosecutor, in his opening statement before the guilt/innocence phase, told the jury that they would "hear evidence in this case that Butts could have pulled the trigger on that shotgun and you will also hear some evidence from which you can conclude that it was this defendant . . . who pulled the trigger. (Doc. 9-14 at 36). Also during the guilt/innocence phase, the State introduced Wilson's confession in which Wilson said Butts had the gun and Butts shot Parks. (Doc. 9-17 at 117-21). Wilson maintained he did not get out of the car and had no idea that Butts was going to shoot Parks. (Doc. 9-17 at 120).

In his closing argument during the guilt/innocence phase of Wilson's trial, the prosecutor argued:

> I told you in my opening statement – I wanted to be candid with you – the State cannot prove who pulled the trigger in this case. I'll tell you that point blank. I wasn't there. We weren't there. The defendant was there; his

> co-defendant was there and the victim was there and the victim obviously cannot speak. But we don't know. When I say we don't – we know this. We know that one of these two . . . defendants brutally assaulted and killed Donovan Corey Parks, and one them had to pull the trigger. But could it have been Butts? Yeah. I'm not conceding that point, I want that crystal clear. Could it have been Wilson, this defendant? Yeah. . . . It was one of these two, but it could have been either one. Okay?

(Doc. 10-1 at 5-6).

Also during closing, the prosecutor explained the charge of malice murder:

> You'll hear about the deliberate intention, unlawfully, to take away the life of another human being. And that's what happened here. Whether he pulled it or his co-defendant, they helped each other.
>
> . . .
>
> [W]hen the . . . muzzle of this gun was aimed at the head of Donovan Corey Parks, that is the malice of which the law speaks and he is guilty of malice murder whether he pulled the trigger or whether the other man pulled the trigger.
>
> . . .
>
> And, one of the two had to have that sawed-off shotgun in their arms. Could have been Butts. Very well could have been Butts. Might

> have been Wilson, but let's assume it was Butts.

(Doc. 10-1 at 20-22, 26).

During the sentencing phase, Chief Deputy Howard Sills testified he did not know whether Butts or Wilson shot Parks. (Doc. 10-4 at 103). But Sills also said three inmates told him Butts confessed to being the triggerman. (Doc. 10-4 at 104, 106). Trial counsel introduced Butts's recorded statement, and the jury heard Sheriff Bill Massee tell Butts that he thought Butts was the triggerman. (Doc. 10-5 at 34, 38). Trial counsel also called Officer Russell Blenk and their investigator, William Thrasher, who both testified inmates told them that Butts confessed he was the shooter. (Doc. 10-5 at 73-78, 83-89).

During his sentencing phase closing argument, the prosecutor explained that Wilson was released from the I. W. Davis Detention Center just three weeks before "he and his buddy robbed . . . Parks of his car and killed him and blew his brains out to leave him on the side of the road. . . ." (Doc. 10-6 at 11). He asked the jury to show Wilson the "same amount of mercy that he granted . . . Parks when he blew his brains out on the side of the road." (Doc. 10-6 at 12). Showing the jury Parks's bloody shirt, the prosecutor said:

> Parks . . . did nothing . . . more than . . . give that man there a ride – a ride. And for what? And for that, he loses his life. For that, that man right there took that shotgun and fired it and into the night . . . it sent 50 pellets . . .

> that flash of light screaming out of this cartridge, aimed right in the back of that man's head, 50 of them. So first, a hole, not just a wound, a hole in the back of his head, to leave him there on the ground with his brains . . . splattered on the ground. . . . That's what he did. That's what I want you to picture him doing. Not just sitting there like he has the whole trial.

(Doc. 10-6 at 19).

In their closing, trial counsel repeatedly stated that Butts was the triggerman:

> [Y]ou shouldn't kill [Wilson] and the reason you shouldn't kill him is because he didn't pull the trigger. He didn't get out of the car. Mr. Butts did that. His partner in crime. He did it. . . . [Wilson] was there; you found him there. You convicted him of malice murder. For that, he should be punished. But he didn't pull the trigger. Mr. Bright told us at the beginning of his opening statement that he wasn't sure. . . . He wasn't going to concede the point. That's what he said. . . . Butts shot him. Even your sheriff on that tape said Butts shot him. And that's why you should spare [Wilson's] life. . . . He didn't pick up the shotgun, as Mr. Bright pointed out to you, and point it and kill him.

(Doc. 10-6 at 35-36).

In the prosecutor's opening statement during Butts's trial, the prosecutor stated that both Butts and

Wilson participated in the murder and that it did not matter who pulled the trigger, although there would be evidence suggesting Butts was the triggerman. (Doc. 43-1 at 3). Wilson's girlfriend, Angela Johnson, testified that Butts brought the sawed-off shotgun into the home she shared with Wilson and told Wilson to keep it. (Doc. 43-1 at 6-7). Two inmates testified that Butts said he was the triggerman.[6] (Doc. 43-1 at 9, 20).

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[6] Wilson includes ncludes excerpts from Butts's trial in an "Appendix" to his brief. (Doc. 43-1). Respondent argues that the Appendix was not part of the record before the state habeas court and, therefore, should not be considered by this Court. Respondent also points out that by submitting select portions of Butts's trial transcript, Wilson has omitted the portions that tend to show his guilt; e.g., testimony that Wilson had a large green bag with a long object in it the day of the murder and testimony that, just a few weeks prior to the murder, Wilson asked for a hacksaw to saw off a shotgun. (Doc. 44 at 154 n.37). Wilson claims that the Appendix is properly before this Court because he previously cited to, and quoted from, these exact pages in his 2005 post-hearing briefs submitted to the state habeas court. (Docs. 47 at 86-87 n.86; 17-9 at 2, 8; 17-10 at 150). The Court sees no harm in considering the Appendix because much, if not all, of the information contained in it is also shown in the Georgia Supreme Court's opinion in Butts's direct appeal. That opinion shows that "a witness testified that Butts had given the weapon to Wilson to hold temporarily" and that "[t]wo of Butts's former jail mates testified that he had admitted to being the triggerman in the murder." *Butts*, 273 Ga. at 762, 546 S.E.2d at 478. Furthermore, the Georgia Supreme Court stated that "Butts then fired one fatal shot to the back of Parks's head with the shotgun." *Id.* at 761, 546 S.E.2d at 477. Given that finding, the Court does not need to see the attached Appendix to conclude that the prosecutor presented evidence and argument to show that Butts was, or might have been, the triggerman.

For attorney error to constitute cause to excuse a procedural default, it must rise to the level of a constitutional violation of the right to counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). *Strickland*[7] applies to appellate counsel. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991). Like trial counsel, appellate counsel are presumed to be effective and they are not required to raise every non-frivolous issue on appeal. *Id.* at 1130-31. Instead, "effective advocates 'winnow out' weaker arguments" even if the argument has some merit. *Id.* at 1131 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). In Wilson's case, appellate counsel were not deficient for failing to raise Wilson's prosecutorial misconduct claim on appeal. Wilson's argument that the prosecutor misled the jury and used "wholly inconsistent arguments to sentence two men to die" is weak at best. (Doc. 43 at 246).

Furthermore, even if appellate counsel performed deficiently when they failed to raise the issue on appeal, Wilson was not prejudiced. Appellate counsel's performance is prejudicial only if the neglected claim would have a reasonable probability of success on appeal. *Heath*, 941 F.2d at 1132. The Court sees no reasonable chance this claim would have prevailed on appeal; certainly the state habeas court's lack of prejudice determination was not based on any unreasonable determinations of the facts. The jury was well aware from the beginning of Wilson's trial that either Wilson or Butts could have fired the shot that killed

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[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

Parks.[8] The prosecutor readily acknowledged this at the outset and he acknowledged the same in Butts's trial. Contrary to Wilson's assertion, this is not a "flip-flopping" theory of the crime or "irreconcilable theories of the crimes." (Docs. 43 at 240; 47 at 83).

Also, Wilson has not shown that the Court's failure to consider this claim would result in a fundamental miscarriage of justice. This is not an "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. Nor has Wilson shown by clear and convincing evidence that but for constitutional error, no reasonable juror would have found him eligible for the death penalty under Georgia law. *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992).

B. Claims that were reviewed on the merits

1. Ineffective assistance of trial counsel

Strickland is "the touchstone for all ineffective assistance of counsel claims." *Blankenship v. Hall*, 542 F.3d 1253, 1272 (11th Cir. 2008). "A convicted defendant's

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[8] Respondent submitted to the state habeas court notes from July 1998 "interviews" with the jurors. These affidavits show several jurors believed Butts to be the shooter, or thought that Butts might have been the shooter, and reveal the jury discussed the issue of who actually shot Parks during deliberations. These jurors stated they determined it did not matter who the triggerman was because Wilson was guilty of malice murder and deserved the death penalty due to his participation in the crime. (Docs. 14-11 at 63-64, 73, 80, 84, 94, 99; 14-12 at 2). Under former Georgia law, the affidavits of jurors were admissible "to sustain but not impeach their verdict." O.C.G.A. § 17-9-41 (repealed 2001).

claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Wilson "must meet both the deficient performance and prejudice prongs of *Strickland*" to obtain relief. *Wong v. Belmontes*, 558 U.S. 15, 16 (2009). To establish deficient performance, Wilson must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Court must apply a "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 689). "To overcome that presumption, [Wilson] must show that counsel failed to act 'reasonabl[y] considering all the circumstances.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, Wilson must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* When determining if prejudice exists, "it is necessary to consider *all* the relevant evidence that the jury would have had before it if [Wilson's counsel] had pursued the different path – not just the mitigation evidence [Wilson's counsel] could have presented, but also the [aggravating evidence] that almost certainly would have come in with it." *Wong*, 558

U.S. at 20; *see also Porter v. McCollum*, 558 U.S. 30, 40-41 (2009).

Federal courts must "take a 'highly deferential' look at counsel's performance through the 'deferential lens of § 2254(d).'" *Pinholster*, 131 S. Ct. at 1403 (quoting *Strickland*, 466 U.S. at 689; *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009)). Wilson must do more than satisfy the *Strickland* standard. "He must also show that in rejecting his ineffective assistance of counsel claim the state court 'applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (quoting *Bell v. Cone*, 535 U.S. 685, 699 (2002)). That is, "[t]he question is not whether counsel's actions were reasonable [but] whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 131 S. Ct. at 788.

a. Trial counsel's allegedly deficient performance due to lack of death penalty experience

Wilson claims trial counsel's deficient performance was the result of several factors that will be discussed in greater detail below. As a preliminary matter, however, the Court will first address Wilson's contention his trial counsel were inexperienced in handling death penalty cases because it is central to their overall performance and any alleged prejudice. The state habeas court rejected this claim.

> Petitioner was represented at trial by Tom O'Donnell and Phillip Carr, both of whom had extensive criminal experience prior to Petitioners trial. Although Mr. O'Donnell, at the time of Petitioner's trial, had never been lead counsel through the entirety of a death penalty trial, he had worked with a very experienced death penalty attorney in fully preparing a death penalty case for trial, in which the defendant pled guilty immediately prior to trial. Although Petitioner argues that these two men were not qualified to represent him at trial according to certain guidelines, this Court finds that, regardless of counsel's experience, Petitioner has the burden of establishing that counsel were deficient and that their deficient representation prejudiced Petitioner. This Court finds that Petitioner has failed to carry that burden.

(Doc. 18-4 at 13-14) (record citations omitted).[9]

The state habeas court reasonably found that both O'Donnell and Carr had significant criminal experience. O'Donnell, who started practicing law in 1987, had handled ten or eleven murder cases. (Doc. 12-8 at

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[9] Wilson first argues that "[o]ther than noting counsel's 'extensive criminal experience' and Mr. O'Donnell's experience as co-counsel on a capital case prior to a plea being reached, the court gave no reasoning for its determination." (Doc. 43 at 106) (quoting Doc. 18-4 at 13). State courts are not required to provide reasoning for their decisions. As long as a state court decides an issue on the merits, with or without further explanation, this Court defers to that decision. *See, e.g., Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1329-30 (11th Cir. 2013); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1213 (11th Cir. 2013).

29, 76). Carr, who also had been practicing since 1987, had handled as many as a thousand criminal cases and had tried approximately 25, including four or five murder trials. (Doc. 12-6 at 66-68).

Wilson argues neither had sufficient experience in death penalty cases and suggests O'Donnell misled the trial court in that regard.

> THE COURT: And I can't say I – you know – one of the things about appointed counsel, even in death penalty cases, we tried to pick you the best that we have in the circuit and Mr. O'Donnell has tried a number of death penalty cases I know of. Not in this circuit, but – in this circuit?
>
> MR. O'DONNELL: The Middle Circuit, ma'am.

(Doc. 8-12 at 6). In fact, neither O'Donnell nor Carr had tried a death penalty case. (Docs. 12-6 at 95-97; 12-8 at 31-35). O'Donnell had served as second-chair in one death penalty case that settled prior to trial.[10] (Doc. 12-8 at 31). O'Donnell said he agreed with the trial court's statement about his experience because he thought the court "was referring to the murder cases [he had] tried, also capital cases, not death penalty cases." (Doc. 12-8 at 33).

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[10] The state habeas court found that the defendant in this death penalty case "pled guilty immediately prior to trial." (Doc. 18-4 at 13). The record is unclear regarding exactly when the defendant pled guilty. However, this factual finding is reasonable because the record establishes that "the case was prepared" but did not go to trial. (Doc. 12-8 at 35).

Wilson also notes trial counsel had no specialized training in the defense of death penalty cases which, according to Wilson, violates ABA Guidelines and the Georgia Unified Appeal rules. (Docs. 43 at 13, 70; 12-6 at 95-97; 12-8 at 31-35).[11] But there is no clearly established Supreme Court precedent holding that a lawyer lacking death penalty trial experience or specialized training is *per se* ineffective. Rather, experience is only one factor a court should consider when determining whether an attorney's particular strategic choices are reasonable. *See Gates v. Zant*, 863 F.2d 1492, 1498 (11th Cir. 1989); *Strickland*, 466 U.S. at 681.

Given that O'Donnell and Carr had significant criminal experience, the state habeas court's assessment of their experience and its effect on their performance was not contrary to clearly established federal law, did not involve an unreasonable application of federal law, and was not based on any unreasonable determinations of fact.

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[11] *See* Guidelines 5.1(1)(A)(vi) and 5.1(1)(B)(ii)(d) of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989); *see also* Rules II(A)(1)(a)(5) and II(A)(1)(b)(3) of the Georgia Unified Appeal Procedure. The ABA Guidelines and similar local or state rules provide "evidence of what reasonably diligent attorneys would do" but are not "inexorable commands with which all capital defense counsel must fully comply." *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (internal citations and quotation marks omitted). Such guidelines or rules do not provide the definition of reasonableness. " '[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.' " *Id.* at 9 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).

b. Trial counsel's allegedly deficient performance in the development and presentation of mitigation evidence in the sentencing phase

Wilson argues his trial counsel were deficient in the development and presentation of mitigation evidence for several reasons. It is appropriate to note first the temporal context in which counsel's investigation and trial preparation took place. O'Donnell knew as early as July 22, 1996 that the State would seek the death penalty. (Docs. 8-1 at 23-24; 8-10 at 6-7). He further knew that background investigation was important in a death penalty case. (Doc. 12-8 at 42). Even so, Wilson's lawyers spent only 50 hours between April 9, 1996 and April 11, 1997 preparing for his trial.[12] (Docs. 8-11 at 10; 12-8 at 49; 14-12 at 75-84).

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[12] At an April 11, 1997 *ex parte* pretrial conference, O'Donnell provided the trial court with "a copy of exactly what [they've] done so far." (Docs. 8-11 at 10; 14-12 at 75-84). This showed they had worked 50 hours between April 9, 1996 and April 11, 1997. (Doc. 12-8 at 49, 51). When questioned whether 50 hours was correct, O'Donnell stated that "would be about right." (Doc. 12-8 at 49). Trial counsel had filed their first pretrial motions the same day. They petitioned the court for expert and investigative assistance and funding for psychiatric and sociological evaluations. (Doc. 8-1 at 31-33, 36-40). At the hearing, O'Donnell told the trial court he wanted to hire psychiatrist Dr. Renee Kohanski, but he had not asked her how much she would charge because he anticipated Wilson would plead guilty. (Doc. 8-11 at 4-5). The trial court authorized funds to hire an investigator, Thrasher, but denied funding for Kohanski until trial counsel knew what her charges would be. The court deferred ruling on the request for funds for a sociologist. Trial counsel eventually retained Kohanski on August 1,

i) Trial counsel's confusion about who was supposed to investigate Wilson's background

As discussed in more detail below, state habeas counsel developed what Wilson says is evidence of his pervasive and prolonged abuse and neglect, primarily while growing up in Glynn County, Georgia. He claims trial counsel did not discover this mitigation evidence because neither O'Donnell nor Carr took responsibility for investigating and preparing a mitigation case. The state habeas court rejected this claim.

> Philip Carr . . . stated he and his co-counsel (O'Donnell) "split duties" in preparing for trial. He further stated "I did some work on the issue of mitigation. . . ." and "there were phases I was involved in more so than others. I was not involved in as much of the mitigation stage. . . ." When asked who was responsible for the mitigation evidence, Carr stated: "Mr. O'Donnell. And then he would give me assignments that I would take." When O'Donnell was asked who was responsible for going out and investigating Petitioner's background, he stated "that is what I had Mr. Thrasher and Mr. Carr do." His testimony was that Carr was to do "both the investigation in Glynn County and everything else."
>
> On the surface, it appears there was confusion between counsel as to who was responsible for

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1997; they made no further request for a sociologist. (Docs. 12-8 at 43-44; 14-11 at 29; 8-11 at 6).

> investigating and preparing mitigation evidence, specifically Petitioner's family background. The question raised by this apparent confusion is whether the result was a failure to investigate because of miscommunication and inattention, and whether this rendered counsel's performance constitutionally deficient. When considering [counsel's] testimony in context, however, the Court finds no such deficiency. As lead counsel, O'Donnell had Carr and the investigator report to him. He received daily reports from them while they were in Glynn County, and monitored their progress. Counsel spoke with Petitioner's mother, father, and girlfriend. They also interviewed, or attempted to interview, a number of other witnesses. There is no indication of a haphazard investigation, nor of a lack of sharing of information between counsel. Any miscommunication which may have occurred did not result in a lack of preparation of mitigating evidence. Counsel made a reasonable investigation into Petitioner's family background, and reasonable decisions as to what evidence to prepare and present, consistent with their defense strategy. The Court finds no deficiency in counsel's performance in this regard, nor was Petitioner prejudiced in any way, given the particular facts and circumstances of the case.

(Doc. 18-4 at 18-20) (record citations omitted).

Trial counsel's confusion extended far beneath the "surface." At a June 26, 1997 pretrial hearing, four

months before the start of trial, the trial court asked about their mitigation investigation.

> THE COURT: Now, I want to remind the attorneys that they need to be prepared not only to present evidence in the guilt and innocence phase, but they also are to present evidence in the sentencing phase in mitigation on behalf of the defendant, Mr. Wilson. Understand?
>
> MR. O'DONNELL: Yes, ma'am.
>
> THE COURT: Are you all going to divide that up or have you made that decision yet?
>
> MR. O'DONNELL: We haven't made a decision on that, your Honor.

(Doc.8-13 at 25-26).

This confusion, or indecision, continued when trial counsel finally began their investigation. O'Donnell, in his investigation of background information to use in mitigation, talked only with Wilson, Wilson's mother (Mildred Charlene Cox), Wilson's girlfriend (Johnson), Kohanski, and Dr. James Maish, a psychologist trial counsel ultimately decided not to use. (Doc. 12-8 at 44-45, 63-64). He did not interview anyone else because, he testified, Carr and Thrasher were tasked to "go and find friends and family members and teachers and so forth." (Doc. 12-8 at 44-45, 63-64, 78-79, 94).

Carr, on the other hand, testified at the state habeas court hearing that he did not get too involved with the mitigation case because O'Donnell was responsible for gathering the mitigation evidence. (Doc. 12-6 at

115). Like O'Donnell, he only spoke with Wilson, Cox, Johnson, Kohanski, and Maish. (Doc. 12-6 at 72-73, 78-80).

Thrasher testified that, although he knew Wilson had a troubled upbringing, he did not have the time or resources to identify and locate witnesses who could "flesh out this story." (Doc. 12-11 at 27). He claimed that he was "[a]t no time . . . directed to conduct investigation into Mr. Wilson's life history for mitigating information, such as by locating and interviewing family members, teachers or social workers." (Doc. 16-13 at 73).

It is not entirely clear whether the state habeas court found that there was no confusion, other than on the surface, as to who was responsible for developing background information to use in mitigation or simply found there was an adequate investigation notwithstanding any confusion. The state habeas court's finding that "O'Donnell had Carr and the investigator report to him" while they were in Glynn County and provide daily reports so he could monitor their progress seems to be a finding that there was no confusion. (Doc. 18-4 at 19). However, it is not clear how this monitoring relates to Wilson's contention that trial counsel were confused about who was doing the background investigation. Carr and Thrasher went to Glynn County to interview aggravation witnesses identified by the State and to review records of offenses identified by the State in its notice of aggravating circumstances.[13] (Docs. 8-5 at 54-57; 12-6 at 86, 114). While in

[13] From these filings, trial counsel learned that the State could potentially present 39 witnesses to testify about 27 aggravating

Glynn County, neither Carr nor Wilson interviewed Wilson's family, friends, former teachers, or any social workers who might be familiar with Wilson's background.[14] (Docs. 12-6 at 114; 16-13 at 73). Given that Carr and Thrasher were not in Glynn County to develop mitigation evidence, the state habeas court's finding that O'Donnell monitored their progress does not support a conclusion that trial counsel were not confused about who was to investigate Wilson's "family background." (Doc. 18-4 at 19).

Next, the state habeas court found that, notwithstanding any confusion or miscommunication, trial counsel "made a reasonable investigation into [Wilson's] family background, and reasonable decisions as to what evidence to prepare and present, consistent with their defense strategy." (Doc. 18-4 at 19). In this finding, the state habeas court clearly did not address whether counsel was confused, but rather moved to the question of whether their investigation was deficient. That finding is more appropriately addressed in this

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circumstances during the sentencing phase of Wilson's trial. (Doc. 8-5 at 54-57). These aggravating circumstances included crimes Wilson committed as an adult while living in Baldwin County and his membership/leadership in a gang. (Doc. 8-5 at 54-57). Also included were numerous crimes Wilson committed, or was accused of committing, when he was a juvenile living with his mother in Glynn and McIntosh Counties. (Doc. 85 at 54-57). The number of witnesses in aggravation ultimately increased to 72 and the number of aggravating circumstances rose to 29. (Doc. 8-9 at 26, 52).

[14] Thrasher stated that such an investigation would have taken a least a month and he did not have the necessary time or resources. (Doc. 12-11 at 27).

Court's discussion of that issue. But with regard to Wilson's contention that counsel were confused about who was to investigate Wilson's background, the facts are undisputed. O'Donnell and Carr each claimed the other was responsible for interviewing background witnesses. Not surprisingly, those witnesses were never interviewed.[15] Thus, to the extent the state habeas court found that trial counsel were not confused about who was to interview background witnesses or that background witnesses were interviewed notwithstanding any confusion, those findings are unreasonable. Whether trial counsel's confusion prejudiced Wilson is discussed below.

ii) Trial counsel's allegedly deficient investigation of Wilson's background

Wilson contends that trial counsel's failure to investigate his background prevented them from presenting a constitutionally adequate case of mitigation during the penalty phase of his trial. "It is unquestioned that under the prevailing professional norms at the time of [Wilson's] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter*, 558 U.S. at 39 (quoting *Williams*, 529 U.S. at 396). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

[15] As discussed below, most, and perhaps all, of the information Wilson says trial counsel would have learned from these witnesses is found in the records trial counsel gathered and provided to Kohanski to use in her trial testimony.

Strickland, 466 U.S. at 691. Thus, the "question under *Strickland* is . . . whether [trial counsel] conducted an adequate background investigation or reasonably decided to end the background investigation when he did." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 931 (11th Cir. 2011) (citing *Ferrell v. Hall*, 640 F.3d 1199, 1226 (11th Cir. 2011)). To answer these questions, the court must consider whether the information counsel learned from the few sources they contacted or the records they obtained would have caused reasonable counsel to ask more questions or seek information from additional sources. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

In addressing the overarching question of whether trial counsel's "pretrial investigation into Petitioner's background" was deficient, the state habeas court made several determinations. The state habeas court first found

> that Petitioner's defense counsel conducted a reasonable investigation of Petitioner's background by interviewing and speaking with Petitioner, and interviewing Petitioner's mother to obtain a social history of Petitioner. However, Petitioner's mother was uncooperative and did not want to testify at trial, and despite counsel's numerous interviews with Petitioner himself, Petitioner did not provide counsel with the names of any of his family members. In fact, Petitioner told trial counsel, when asked about family members to contact, that he had no contact at all with his father's side of the family. "That they never wanted

> him anyway and nobody would even just acknowledge he existed."

(Doc. 18-4 at 20) (record citations omitted).

Wilson contends his mother was cooperative, but trial counsel never interviewed her to get a "social history." In an affidavit submitted to the state habeas court, Cox said trial counsel only "asked [her] about [Wilson's] father, Marion, Sr., and didn't ask [her] anything about any of the other men [she]'d lived with or about [Wilson's] schooling and so forth." (Doc. 12-10 at 69). Wilson argues that had trial counsel just asked the right questions, Cox would have provided the names of many valuable mitigation witnesses and she would have told them of her drug abuse during pregnancy, the physical abuse Wilson suffered at the hands of her father and boyfriends, the drug use to which Wilson was exposed, Wilson's problems in school, and the deplorable conditions in which they lived. (Docs. 43 at 96-98; 12-10 at 65-66).

Carr testified that he and O'Donnell met with Cox several times and that, although she was generally cooperative, "she was pretty defensive about . . . bringing out whether or not she was a bad mother . . . [a]nd it kind of, in one respect, was hampering our ability to find mitigation." (Doc. 12-6 at 80-81). O'Donnell, in brief testimony on the subject, said he talked with Cox because he "wanted to get a social history." (Doc. 12-8 at 63). The state habeas court credited their recollection of events over the affidavit testimony of Cox. Because the state habeas court's factual findings are

presumed correct absent clear and convincing evidence to the contrary, this Court will not revisit its credibility determinations.

Moreover, there is evidence that Cox was less than cooperative and might have impeded trial counsel's ability to gather mitigation evidence. Helen McCloud Watkins, a person with whom Wilson lived for a time during his youth, testified that someone telephoned her once prior to Wilson's trial.[16] When Cox learned of the phone call, she told Watkins that she had no right to speak with trial counsel about Wilson. (Doc. 12-7 at 51, 60-62). Also, a note in trial counsel's file, which was apparently written by trial counsel and passed to Wilson either during or after Kohanski's testimony at sentencing, read: "When I talked with your mother, she essentially denies this. She probably would be a weak witness and would try to defend her action. This would contradict Dr's testimony. Do you want me to call her?" (Doc. 14-12 at 29). Thus, the state habeas court's factual findings that trial counsel spoke with Cox to get a social history and that she was uncooperative were reasonable.

The state habeas court also reasonably found that Wilson was unable to provide information about his father's side of the family and that he failed to "provide

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[16] It is unclear who called Watkins and what she was asked. O'Donnell and Carr both testified that they never spoke with Watkins. (Docs. 12-6 at 114-15; 12-8 at 46-47). Watkins testified that trial counsel or "whoever it was" asked "a few questions" but she could not remember the questions and she only spoke with the caller for a few minutes. (Doc. 12-7 at 51, 61-62).

counsel with the names of any of his family members."[17] (Doc 18-4 at 20). But Wilson's inability to provide trial counsel with names of witnesses did not relieve trial counsel of their obligation to investigate. *See Porter*, 558 U.S. at 40 (finding defendant's lack of cooperation did not "obviate the need for defense counsel to conduct *some* sort of mitigation investigation"). Trial counsel knew that Wilson had a troubled past. (Doc. 8-1 at 39). Yet their efforts to interview witnesses with knowledge of that past were limited to talking with Wilson, the uncooperative Cox, and Johnson, who did not meet Wilson until 1995. (Doc. 12-11 at 9). As discussed below, dozens of potential witnesses were named in the records trial counsel received, and Wilson never tried to prevent trial counsel from speaking with them.

The state habeas court next found that, notwithstanding Cox's lack of cooperation and Wilson's failure to provide names of potential witnesses, trial counsel nevertheless interviewed or attempted to interview witnesses. (Doc. 18-4 at 21). Further, according to the state habeas court, trial counsel testified that they "spoke with Petitioner's father, Marion Wilson, Sr., and another man[,]" and they "attempted to talk to someone at [the Department of Juvenile Justice ("DJJ")] and at the college Petitioner had attended." (Doc. 18-4 at 21) (record citations omitted).

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[17] As Wilson notes, however, he did give trial counsel the names of several friends and the name of his Godmother. (Doc. 14-12 at 64).

The state habeas court's order lists a total of 16 record citations to support the finding that trial counsel interviewed witnesses and attempted to contact potential witnesses. (Doc. 18-4 at 21). Eleven of these citations are to the testimony of State witnesses in the guilt phase of the trial. Wilson understandably complains that these citations do not support the finding that trial counsel interviewed or attempted to interview anyone. Respondent responds that "[t]he string citation by the state habeas court includes the witnesses that testified at trial that trial counsel interviewed or attempted to interview." (Doc. 44 at 27 n.4). But they all were witnesses who saw Wilson, Parks, Butts, or Parks's burning car on the night of the murder. None provided, or could have provided, background information about Wilson. Thus, even if trial counsel did interview these witnesses, that does not at all tend to establish that trial counsel reasonably investigated Wilson's background.

Contrary to the state habeas court's finding that Wilson's father was interviewed, O'Donnell, Carr, and Thrasher all testified they never talked with Marion Wilson, Sr. (Docs. 12-8 at 46; 12-6 at 114; 16-13 at 73-74). In an affidavit filed with the state habeas court, Marion Wilson, Sr. confirmed that no one representing Wilson contacted him until the state habeas proceedings.[18] (Doc. 12-10 at 89).

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[18] When rejecting Wilson's claim that trial counsel were confused about who was to investigate Wilson's background, the

Regarding "someone" at the DJJ or Georgia Military College ("GMC"), O'Donnell said they attempted to talk to a GMC teacher, Melanie Moye,[19] but "[t]hat's about it." (Doc. 12-8 at 63). He stated that there may have been "one other woman in Glynn County," but he simply could not remember.[20] (Doc. 12-8 at 64). O'Donnell knew Wilson had a history with the DJJ, but he did not interview anyone there or any social worker assigned to Wilson. (Doc. 12-8 at 63). However, O'Donnell thought someone might have spoken with the DJJ in Glynn County. (Doc. 12-8 at 63). It is not clear whether Carr or Thrasher spoke with anyone at the DJJ while they were in Glynn County. However, as discussed, it is clear that they went to Glynn County to investigate Wilson's juvenile criminal history rather than to develop mitigation evidence. (Docs. 12-6 at 86, 114; 16-13 at 73; 12-11 at 26-27).

Nevertheless, the state habeas court concluded counsel attempted "to locate and talk to witnesses," but

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state habeas court also found that trial counsel interviewed Wilson's father. (Doc. 18-4 at 19). The basis for this finding is a mystery.

[19] It bears mentioning that trial counsel never actually spoke with Moye. In an affidavit, Moye testified that she never spoke with trial counsel and "wondered why no one on his defense team had ever contacted" her. (Doc. 12-9 at 21).

[20] It is possible this "one other woman" may have been Watkins. As noted, she testified that trial counsel called her on one occasion, asked a few questions, and never contacted her again. However, both O'Donnell and Carr stated that they never spoke with Watkins. (Docs. 12-6 at 114-15; 12-8 at 46). Regardless, Watkins provided no information about Wilson's background during this brief conversation. (Doc. 12-7 at 51, 61-62).

"the witnesses trial counsel were able to find were more devastating than helpful to Petitioner's case." (Doc. 18-4 at 21). To appreciate this point, it is necessary to discern exactly what trial counsel's mitigation strategy was and how the witnesses they supposedly interviewed harmed Wilson's "case."

Respondent describes counsel's strategy as a "multi-faceted mitigation theory of residual doubt, mental health and dysfunctional upbringing and background." (Doc. 44 at 42). The residual doubt argument was that "Butts was actually the guy that pulled the trigger . . . Wilson was a bystander or played very little role in it." (Doc. 12-6 at 113).

The balance of their mitigation theory was summarized in trial counsel's "List of Mitigating Circumstances" filed with the state trial court:

> 1. At a very early age, Defendant exhibited signs of mental or emotional disturbance that went untreated;
>
> 2. Defendant's mental and/or emotional disturbances were caused in part[] by the emotional instability of his family members during his early developmental stages;
>
> . . .
>
> 4. Defendant suffered neglect and deprivation in his childhood years as a result of family violence, turmoil, his father's abandonment, alcoholism within his home, his bi-racial status within the community,

the neglect by certain family members, and other factors;

5. During his early school years, his family was forced to move often because of violence and turmoil in his family;

6. Defendant was unable to learn properly in school because of his lack of aptitude, family turmoil, and lack of academic assistance from his parents;

7. Defendant was abused by his stepfather.[21]

(Doc. 8-9 at 62). Clearly, the witnesses[22] who would develop this mitigation theory were the background witnesses trial counsel never interviewed. Nevertheless, Carr said he made the "judgment call" not to call witnesses who could testify about Wilson's background.[23] (Doc. 12-6 at 113). Carr said Wilson's "past was horrible" and bringing in Wilson's "past could have very well worked against [them]. . . . And, more likely . . . it

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[21] There were a total of 13 mitigating circumstances; only those relating to Wilson's background are listed.

[22] As opposed to records containing information about Wilson's background. Those records are discussed below.

[23] Trial counsel's list of mitigating witnesses, who presumably were to testify about the mitigating circumstances, contained the same names as the State's List of Witnesses in Aggravation. (Doc. 14-3 at 7-16). Apparently, trial counsel simply added Kohanski and Thrasher to the State's list. As Wilson points out, trial counsel even erroneously labeled their list of mitigation witnesses as a "List of Witnesses in Aggravation." (Doc. 14-3 at 11).

would basically convince the jury that [Wilson] probably was the trigger man." (Doc. 12-6 at 91, 112).

This rationale for not presenting background evidence in mitigation is suspect at best. Trial counsel unquestionably knew the jury was going to hear the worst of Wilson's past regardless of who trial counsel put on the stand. They had notice of the State's 29 aggravating circumstances from Wilson's past, ranging from aggravated assault and first degree arson to reckless conduct and cruelty to animals. (Docs. 8-5 at 54-57; 8-9 at 26, 52). More importantly, as Carr acknowledged, to make an informed judgment regarding which background witnesses to call, trial counsel first had to find out who the witnesses were and what they would say. (Doc. 12-6 at 113-14).

The only basis for the state habeas court's finding that background witnesses were "more devastating than helpful" was Carr's testimony:

> Q. Okay. Did [Wilson] provide you any sort of list of names, people maybe to contact to assist in mitigation?
>
> A. He didn't provide me any names. Mr. O'Donnell, I don't know. I do know I had talked to him about people he had tried to contact. And some he could not find, some he did find. And upon interviews, I don't think we wanted them. They would have been more devastating than good. But these were discussions with Mr. O'Donnell.

(Doc. 12-6 at 85-86). Thus, Carr claimed O'Donnell talked with the "devastating" witnesses. (Doc. 12-6 at 86). But, again, O'Donnell said he only spoke with Wilson, Cox, and Johnson in his efforts to obtain information about Wilson's background:

> Q. How about someone to go out and investigate his background?
>
> A. That is what I had Mr. Thrasher and Mr. Carr do.
>
> Q. You had Mr. Thrasher and Mr. Carr investigate Marion Wilson's background?
>
> A. His background, yes, sir.
>
> Q. And their job was to go and find friends and family members and teachers and so forth?
>
> A. That was their job, yes, sir.
>
> Q. That is interesting because Mr. Carr sat in the exact same chair you are sitting in 24 hours ago, and he said it was your job to go out and investigate Mr. Wilson's family background?
>
> A. I can't speak for Mr. Carr, but, no, it wasn't my job. But I did talk to Mr. Wilson, I did talk to his mother, I did talk to his girlfriend. I did talk to – who else was down in Glynn County? I didn't go to Glynn County. [Carr] and [Thrasher] went to Glynn County.

(Doc. 12-8 at 44-45). Given trial counsel's admission that they never spoke with background witnesses, the

state habeas court's finding that the potential background witnesses to whom trial counsel spoke "were more devastating than helpful" is unreasonable.

In further support of its conclusion that trial counsel's pretrial background investigation was not deficient, the state habeas court found trial counsel requested numerous files from various agencies, schools, and medical facilities and that counsel "received many of these requested files." (Doc. 18-4 at 21-22). The record clearly supports this finding.[24] Of course, simply requesting and sometimes receiving records does not automatically render trial counsel's investigation reasonable.

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[24] In letters dated June 3, 1996 trial counsel sought: Baldwin County Sheriff's Department investigation and conviction records for Wilson and Butts; Baldwin County Sheriff's Department jail records for Wilson; Milledgeville Police Department investigation and conviction records for Wilson and Butts; Milledgeville Police Department jail records for Wilson; Wilson's employment records from Cheely's Lawn Care and Restaurant Management Services; Division of Youth Services records for Wilson; Georgia Department of Corrections records for Wilson; Fulton County jail records for Wilson; Fulton County Sheriff's Department investigation and conviction records for Wilson; GMC school records for Wilson; Wilson's medical records from the Georgia Regional Hospital at Savannah ("Georgia Regional Hospital") and Southeast Georgia Regional Medical Center in Brunswick; Wilson's birth certificate from the Georgia Vital Records Service; Wilson's school records from the Boards of Education in Wayne, Glynn, and McIntosh Counties in Georgia and Oklahoma City in Oklahoma; Glynn County jail records for Wilson; Glynn County Police Department investigation and conviction records for Wilson; Glynn County Sheriff's Department investigation and conviction records for Wilson; McIntosh County jail records for Wilson; and McIntosh County Sheriff's Department investigation and conviction records for Wilson. (Docs. 14-8 at 103-09; 14-9 at 1-16).

See Pinholster, 131 S. Ct. at 1406 (explaining there are no specific guidelines for determining reasonableness). Rather, the Court must consider what trial counsel learned from the records and ask if it was reasonable for them to abandon their investigation when they did, especially in light of the fact that trial counsel knew of Wilson's deprived childhood and intended, initially at least, to present mitigating life history evidence. *Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006) (explaining that when evaluating the reasonableness of an investigation, the court must consider whether the known evidence would prompt a reasonable attorney to investigate further).

Trial counsel should have learned much from the records they received. Marion Wilson, Sr. left Cox when she was two months pregnant. (Doc. 13-15 at 44).[25] Cox was then "married by common [l]aw[] to Arthur Kimp," but "Cox left Arthur after Marion walked into a room and saw Arthur holding a gun to his mother's head." (Docs. 13-15 at 44, 63; 13-13 at 11-12, 20). Next, Cox lived with Wilson's "stepfather Reginald" or a "man named Reginald."[26] (Docs. 13-12 at 103; 13-15 at 44). Trial counsel never contacted these men.

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[25] These record cites are to Kohanski's file, which was an exhibit at the state habeas evidentiary hearing. (Doc. 13-12 at 73 to Doc. 13-16 at 21). The records in her file were given to her by trial counsel. (Doc. 10-5 at 100). Thus, trial counsel had these records prior to trial.

[26] According to Georgia Regional Hospital records, Reginald's last name was McLeod or McCloud. (Doc. 13-14 at 11).

Records from Georgia Regional Hospital revealed that Cox "had numerous liaisons and is at the present time [1992] involved with Lindel Sullivan," whose "drinking and verbal and physical abuse is such that [Wilson] feels uncomfortable in his own home." (Doc. 13-14 at 11). The hospital records also refer to DFCS's involvement: "It was the court service worker[']s[27] impression that Ms. Cox values the relationship of her boyfriend over that of her son. The situation has been referred to DFCS." (Doc. 13-14 at 4-5, 11, 19).[28] Wilson's dysfunctional home life was documented: "The mother's present boyfriend is the reason that the patient says he has problems"; "There appears to be much friction in the home, lack of adequate parenting"; "Pt. comes from bad home situation"; "Examiner feels parenting has been lacking and has taken its toll on his development"; "Marion has been known to go to school without adequate clothing"; "There is said to be some turmoil within the home situation"; and "Court worker indicates mother is uncooperative." (Docs. 13-13 at 23-24, 37; 13-14 at 2, 7, 10-11).

The records reveal that Wilson wanted his social worker to have him placed in foster care or a "contract home" so that he could "[t]ry to straighten up" and "go to school." (Doc. 13-13 at 31). The psychologist at Georgia

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[27] The records identify the court service worker as Marie Aldridge. (Doc. 13-14 at 4-5, 19).

[28] DFCS's involvement during this time is confirmed by other records obtained by trial counsel. The Order for Detention dated December 20, 1991 shows that "McIntosh County [DFCS] is ordered to complete a child protective services assessment and have home evaluation with report to the court." (Doc. 12-18 at 30).

Regional Hospital who examined Wilson recommended a group home or contract home setting because Wilson needed "a more structured environment that is capable of providing the level of security that he seems to need while also provid[ing] consistency [and] positive parenting." (Doc. 13-14 at 13).

In sum, the records trial counsel received contained a wealth of information about Wilson's troubled past, yet trial counsel did not get Wilson's DFCS records, they did not interview DFCS workers, and they did not interview any other social worker who had been in contact with Wilson. Nor did they contact teachers, counselors, or the school psychologist mentioned in the records. (Docs. 13-12 at 103; 13-13 at 1, 18, 20).

Finally, in support of its conclusion that trial counsel's background investigation was not deficient, the state habeas court noted that counsel hired two mental health experts, Maish and Kohanski. Actually, the Parties' briefs and the state habeas court's order appear to address three issues regarding Maish and Kohanski: whether Maish's and Kohanski's work, whatever it was, supports the conclusion that trial counsel properly investigated Wilson's background; whether trial counsel properly prepared Kohanski for trial; and whether Maish or Kohanski requested psychological testing, and if so, whether trial counsel were deficient when they failed to make arrangements for the testing. Because all three issues relate to the investigation and development of mitigation evidence, it is appropriate to address the issues together.

In a section of its order headed "Trial Counsel's Pretrial Investigation into Petitioner's Background," the state habeas court first addressed the hiring of Maish.

> Trial counsel also hired Dr. James Maish to conduct a psychological evaluation, to present Petitioner's background, and to act as a "substitute for a sociologist." However, after Dr. Maish had evaluated Petitioner . . . trial counsel made the reasonable strategic decision not to call Dr. Maish to testify. . . . Trial counsel testified that . . . Dr. Maish said he did not want to testify "because if he testified, . . . he would have to say that [Wilson] was a sociopath."

(Doc. 18-4 at 22) (record citations omitted).

Maish did not investigate Wilson's background. Rather, trial counsel asked him to perform a psychological evaluation on Wilson and "talk to [Wilson] . . . about the background, his mother, and things." (Doc. 12-8 at 43-44). Thus, while Maish may have been hired to "present [Wilson's] background," his role in the case does not directly address Wilson's contention that trial counsel failed to conduct an appropriate investigation to uncover facts from Wilson's background essential to an effective mitigation defense. Still, counsel's plan for Maish to evaluate Wilson and present his background provides some support for the state habeas court's conclusion that counsel "were not deficient by [their] investigation of Petitioner's background." (Doc. 18-4 at 23).

As it turned out, Maish's involvement was very brief. Trial counsel first met Maish on August 17, 1997. They told him "what [they] knew about some of [Wilson's] past," the facts of the case, and their defense theory that Butts, not Wilson, was the actual shooter. (Docs. 16-1 at 54-55; 16-10 at 89). Trial counsel asked Maish to evaluate Wilson, but not to do a written report until after he spoke with them. (Doc. 12-8 at 97).

On August 28, Maish met with Wilson for approximately two to two-and-one-half hours. (Docs. 12-10 at 17; 16-10 at 84, 89). He administered no neuropsychological tests during this "get-acquainted session." (Doc. 16-10 at 87). Maish, whose deposition testimony was submitted to the state habeas court, said he told O'Donnell after his meeting with Wilson that Wilson was competent to stand trial, and although he had "a history consistent with antisocial behavior" or sociopathic tendencies, Maish did not form a diagnosis. (Doc. 16-10 at 91-92, 97-98). Rather, Maish said he told O'Donnell he could not reach a diagnosis because he had seen Wilson only once for just a few hours. (Doc. 16-10 at 97). Maish said he explained to O'Donnell that they had a long way to go and asked O'Donnell for "school and medical records and more information about [Wilson's] background and upbringing," all of which he said were necessary to conduct a thorough evaluation and provide a reliable assessment of Wilson. (Docs. 12-10 at 17-18; 16-10 at 88).

Maish said he told trial counsel that a neuropsychological evaluation was needed because Wilson had suffered a head injury at an early age. (Doc. 16-10 at

91, 93). Maish told O'Donnell that he could not help unless he was provided the necessary records and background information and was allowed to perform the necessary tests. (Doc. 16-10 at 92-93). According to Maish, O'Donnell told him there were "no funds available to get the information [he] was asking for or to pay for what [he] needed to do." (Doc. 16-10 at 92). None of the requested records were provided to Maish, and he had no further contact with either Wilson or trial counsel. (Doc. 12-10 at 18).

O'Donnell told a much different story. He testified Maish told him "he did not want to testify because . . . he would have to say that [Wilson] was a sociopath" who would kill again. (Doc. 12-8 at 97). While Carr could not recall Maish asking for Wilson's records, he did recall O'Donnell telling him that Maish wanted Wilson to undergo "testing." (Doc. 16-1 at 57, 59). O'Donnell testified he was concerned that, regardless of what any testing or additional materials might reveal, Maish might still tell the jury his initial impression was that Wilson was a sociopath. (Doc. 12-8 at 98-99).

On this point, the state habeas court credited O'Donnell's recollection of events over Maish's and found that because Maish "would have to say that [Wilson] was a sociopath," trial counsel made the "reasonable strategic decision" not to call him. (Doc. 18-4 at 22). Given the deference this Court must afford the state habeas court's credibility determinations and factual findings, this Court cannot find this determination unreasonable. That, however, does not address

Wilson's contention that trial counsel's background investigation was deficient. Again, Maish did not conduct such an investigation.

Also, the section of its order headed "Trial Counsel's Pretrial Investigation into Petitioner's Background," the state habeas court next addressed Kohanski, who, unlike Maish, played a significant role at trial.

> Trial counsel also retained Dr. Renee Kohanski, a forensic psychiatrist. Dr. Kohanski examined Petitioner twice, consulted with trial counsel, reviewed records, and consulted with a "psychologist/attorney." Trial counsel "discussed anything that could be mitigating" with Dr. Kohanski, interviewed her and explained Petitioner's history to her. Dr. Kohanski testified that she also reviewed records. . . . Further, Dr. Kohanski's testimony from trial establishes that she conducted review of Petitioner's background. . . . Dr. Kohanski ultimately testified at trial and provided information to the jury regarding Petitioner's background for mitigation purposes, including his neglectful home life, lack of supervision as a child, and Petitioner having no adult authority figure. This Court finds that trial counsel were not deficient by trial counsel's investigation of Petitioners background.

(Doc 18-4 at 22-23) (record citations omitted).[29]

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[29] The "psychiatrist/attorney" may have been Maish. Maish testified that he spoke with Kohanski in September 1997, but he was "not very helpful to her in terms of her evaluation because

The state habeas court returned to Kohanski later in its order in a section headed "Preparation of Dr. Kohanski."

> Counsel felt that Dr. Kohanski had experience in dealing with "these kind of cases" as an expert. They interviewed Dr. Kohanski, discussed possible mitigation in the event of conviction, informed her of Petitioner's history, gave her documents and records for review and asked for advice and "discussed anything that could be mitigating." . . . This Court further finds that as Dr. Kohanski never informed trial counsel that further information was needed to complete her evaluation but, instead, informed trial counsel that they had "truly provided an excellent defense; exploring every single option available to you," trial counsel's preparation of Dr. Kohanski was not deficient and Petitioner was not prejudiced.

(Doc. 18-4 at 26) (record citations omitted).[30]

[he] didn't have anything to go on" and there were no funds available to have the neuropsychological testing that he needed in order to evaluate Wilson. (Doc. 16-10 at 92-93).

[30] Kohanski's statement is from a November 11, 1997 post-trial letter to O'Donnell in which she stated: "I enjoyed working with you on the Marion Wilson case and truly appreciate what a difficult ordeal this was. You represented your profession with honor and integrity and truly provided an excellent defense; exploring every single option available to you. Unfortunately your client chose not to heed your advise [sic]. Since this was not secondary to a lack of competence on his part, there was nothing else you could do." (Doc. 14-11 at 34)

Kohanski's testimony at the state habeas hearing paints a different picture. She said O'Donnell wanted a social history, but she told him she would be able to obtain only a "cursory history" and a social worker was needed for a "good social history." (Doc. 16-7 at 23). Instead, as the state habeas court found, Kohanski relied on trial counsel to provide her with as much background information as possible. (Doc. 16-13 at 72). While she looked at records they gave her and interviewed Wilson,[31] she "never took it upon [herself] to search out, locate and interview mitigation witnesses, such as teachers, other family members, social workers, and the like." (Doc. 16-13 at 72).

While Kohanski acknowledged she may not have asked trial counsel for any particular records, she claimed she did ask that Wilson undergo a physical examination and psychological testing. (Doc. 16-6 at 65). O'Donnell testified he recalled Kohanski thought Wilson might have brain damage, and she "wanted a complete mental and physical makeup which includes the MRIs and all that kind of stuff." (Doc. 16-11 at 47). Similarly, Carr testified Kohanski "expressed some concerns about further testing" and "expressed a need for further evaluation[,]" but they "didn't have the money for it." (Doc. 16-1 at 96-97). Thus, Kohanski, like Maish,

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[31] Kohanski thought she may have had some discussions with Cox as well. (Doc. 16-13 at 72).

requested psychological testing. However, trial counsel never requested funds for testing, and none was done.[32]

As far as this Court can determine, the state habeas court made no findings directly addressing Maish and Kohanski's recommendations for psychological testing. If its finding that "Kohanski never informed trial counsel that further information was needed to complete her evaluation" was intended to suggest Kohanski did not request testing, that finding is clearly unreasonable. (Doc. 18-4 at 26). It is undisputed both Maish and Kohanski requested testing.

However, in a section of its order headed "Investigative Support," the state habeas court did address, without mentioning Maish's and Kohanski's recommendations, the failure to request funds for "additional testing." (Doc. 18-4 at 39). The court found trial counsel were not deficient when they did not request funding for testing because Wilson never gave them reason to believe the testing was necessary. (Doc. 18-4 at 38-39). Wilson had obtained his GED, had attended college and earned above-average grades, was able to assist counsel with his defense, knew right from wrong, had average intelligence, and had no history of organic brain damage. (Doc 18-4 at 39).

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[32] As noted, the state habeas court found trial counsel's preparation of Kohanski reasonable because trial counsel interviewed Kohanski, told her of Wilson's past, discussed possible mitigation, and provided her with Wilson's records. It found that Kohanski examined Wilson, consulted with trial counsel, and consulted with Maish. All of these are reasonable findings.

Looking only at those facts, the state habeas court's conclusion that trial counsel reasonably chose not to request funds for testing is both factually reasonable and legally supportable. *See Holladay v. Haley*, 209 F.3d 1243, 1250 (11th Cir. 2000) (counsel not required to seek independent evaluation when defendant does not display strong evidence of mental illness). But viewing those facts in isolation distorts reality. Notwithstanding trial counsel's lay observations of Wilson, it hardly seems reasonable that, without explanation, they would reject the recommendations of their mental health experts.

In sum, the state habeas court's ultimate conclusion that trial counsel were not deficient in the development and presentation of mitigation evidence in the sentencing phase was based on both reasonable and unreasonable determinations of fact. When trial counsel finally began their trial preparation in earnest, they each somehow thought the other was investigating Wilson's background. Contrary to the state habeas court's findings, they did not interview Wilson's father, and they did not make a strategic decision not to call "devastating" background witnesses. They could not have; they never interviewed background witnesses. On the other hand, they hired mental health experts (although they ignored their recommendations for testing), and perhaps most importantly, they gathered considerable documentary evidence of Wilson's troubled background. Yet they ignored the many red flags in these records and did not expand their investigation beyond the records. However, they gave the records to

Kohanski and, through her testimony, presented much of that background evidence to the jury.

As the Court noted at the outset, the conduct of trial counsel in the development of mitigation evidence is difficult to defend. But, rather than deciding whether Wilson has established his trial counsel's performance was deficient, the Court turns to the state habeas court's prejudice determination.

c. The alleged prejudice resulting from trial counsel's allegedly deficient performance in investigation and presentation of mitigation evidence

The Court will first review the evidence trial counsel presented at the sentencing phase and then the evidence Wilson says they should have presented. The Court will then review the state habeas court's conclusion that there was no reasonable probability the new evidence would have changed the outcome.

i) The evidence at the sentencing phase

The State's 22 witnesses in the sentencing phase of Wilson's trial testified regarding Wilson's lengthy criminal history and gang affiliation. The jury heard Wilson started committing serious felonies when he was twelve and since then was "either out committing crimes or . . . incarcerated somewhere." (Doc. 10-6 at 9).

On January 31, 1989, twelve-year-old Wilson and two other boys started a fire in a vacant duplex apartment in Glynn County. (Doc. 10-2 at 94-96, 98). The residents of the attached unit were home at the time. (Doc. 10-2 at 99). All three boys were charged with first degree arson and criminal trespass. (Doc. 10-2 at 96).

John J. Schrier testified he and his mother lived next door to Wilson in Glynn County in 1989. (Doc. 10-2 at 115). After Schrier's mother, an elderly heart patient, complained that Wilson was harassing her and her dogs, Schrier asked Wilson to leave his mother and her dogs alone. (Doc. 10-2 at 115). Wilson responded, "I'll blow you and that old bitch's head off." (Docs. 10-2 at 115; 10-6 at 4).

Former McIntosh County Sheriff's Deputy Robert Wayne Hoyt testified that on December 16, 1991, fifteen-year-old Wilson shot Jose Luis Valle, a Mexican migrant worker. (Docs. 10-2 at 101-05; 10-6 at 4). Brian Keith Glover testified he and his two cousins were with Wilson the night he shot Valle. According to Glover, they were standing in the parking lot of a convenience store when Valle, a stranger to them all, walked past and into the store. Wilson announced he was going to rob Valle and that he "wanted to see what it felt like to shoot somebody." (Doc. 10-2 at 127). Wilson, who had a pistol, approached Valle as he left the store. When Valle raised his arms in the air and turned to run, Wilson shot him in the buttocks. (Doc. 10-2 at 123-25). Glover testified that approximately one week after the incident, Wilson, who was again carrying a gun, threatened him because of the statement Glover gave law

enforcement about Valle's shooting. (Doc. 10-2 at 144).[33] Glover's cousin, Oscar Woods, corroborated Glover's story.[34] (Doc. 10-2 at 151; 10-3 at 4-6). The charges against Wilson were dead-docketed because the authorities were unable to locate Valle after he was discharged from the hospital. (Doc. 10-3 at 29).

After Wilson was charged with shooting Valle, he was incarcerated at the Claxton Regional Youth Development Center ("Claxton RYDC"), where he attacked Steve Nesmith, a youth development worker. Nesmith testified Wilson assaulted him, kneed him in the groin, grabbed his legs, and shoved him into a steel door. (Docs. 10-3 at 46-47; 10-6 at 5). After a struggle, another worker and a detainee helped Nesmith subdue Wilson. (Doc. 10-3 at 46-47). Nesmith testified that during the two years he worked at the Claxton RYDC, Wilson was the only detainee who ever attacked him. (Doc. 10-3 at 48-50).

Daniel Rowe testified he attended school with Wilson. (Doc. 10-3 at 37). In January 1993, Wilson and another boy attacked him at school as he was drinking from a water fountain. (Docs. 10-3 at 38-39). Later the

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[33] Trial counsel attempted, with some success, to establish Glover, not Wilson, shot Valle. Valle reported a tall black male hit him in the back of the head with a gun, and he did not know which black male actually shot him. Glover, at 6'3¾", was the tallest male in the group that night. (Doc. 10-2 at 107, 109, 129-30)

[34] On cross examination, trial counsel established Woods originally told the investigating officers he did not know who shot Valle. (Doc. 10-3 at 7).

same day, the two again attacked him. (Doc. 10-3 at 39).

Corporal Craig Brown of the Glynn County Police Department testified that on June 9, 1993 Wilson shot and killed a small dog for no apparent reason. (Doc. 10-2 at 46-48). Juvenile Court Administrator Phillip Corbitt testified Wilson was charged with cruelty to animals and, at a June 25, 1993 arraignment, admitted shooting the dog. (Doc. 10-2 at 90, 92-93).

On June 10, 1993, the day after he was charged with shooting the dog, Wilson was charged with possession of crack cocaine with intent to distribute. (Doc. 10-2 at 62-66, 83-84).

A little more than one month later, Wilson shot Robert Loy Underwood. (Doc. 10-5 at 135-36). Underwood testified that on July 26, 1993 he drove into a neighborhood to look for day labor. (Docs. 10-1 at 106-07; 10-2 at 41). While there, he purchased crack cocaine from two boys.[35] (Doc. 10-1 at 107). As he drove away, something struck him in the head. (Doc. 10-1 at 108, 113-14). When he turned to see what had hit him, he saw Wilson, who was pointing a pistol at him. Wilson then shot five times into the cab of Underwood's truck. (Doc. 10-1 at 108-09, 115). One bullet struck Underwood in the head; another traveled through his arm and lung before lodging in his spine. (Doc. 10-1 at 108, 115). Underwood said Wilson then "turned around and

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[35] On cross examination, trial counsel established Underwood was high on cocaine and over the legal limit of intoxication at the time he was shot. (Doc. 10-2 at 1-2).

just casually walked off." (Docs. 10-1 at 110). Underwood was hospitalized for six days. (Doc. 10-1 at 111, 114, 116). Wilson was charged with the shooting, and Underwood identified Wilson as the shooter during the juvenile proceedings. (Doc. 10-1 at 119).

Detective Ted McDonald with the Glynn County Police Department testified Wilson gave a statement in which he claimed he acted in self-defense when he shot Underwood. (Doc. 10-2 at 36, 38). However, according to McDonald, Underwood's wounds were not consistent with Wilson's claims of self-defense. (Doc. 10-2 at 40-42). Juvenile Court Administrator Corbitt testified Wilson admitted shooting Underwood during a juvenile court hearing. (Doc. 10-2 at 90).

Sergeant Brandon Lee, an officer with the Georgia College Department of Public Safety in Milledgeville, testified that on May 25, 1995, not quite two months after Wilson's release from the Milledgeville YDC,[36] he found Wilson and five others in a Georgia College parking lot shouting at college students. (Docs. 10-3 at 55-56; 10-6 at 9). When Lee asked them to leave the

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[36] At trial, the State did not proffer Wilson's juvenile records into evidence. They were submitted as exhibits to the state habeas proceedings. (Docs. 12-17 at 33-70; 12-18 1-96; 12-19 at 1-54). However, these records show that on October 20, 1993 Wilson was sentenced to DJJ custody for five years for the cruelty to animals, possession of crack cocaine, possession of marijuana, and aggravated assault charges. (Doc. 8-7 at 44-45). He was to be in restrictive custody for an initial period of eighteen months. (Doc. 8-7 at 45). He received an early release from custody and, on March 29, 1995, was allowed to live in an apartment in Milledgeville to attend classes at GMC. (Doc. 8-7 at 46).

campus, Wilson, whom Lee described as the obvious leader of the group, became belligerent. (Doc. 10-3 at 55-56). The group then moved to another parking lot two blocks away where they got involved in another verbal confrontation with students. (Doc. 10-3 at 56). When campus police arrived and again asked the group to leave the campus, Wilson began shouting "gang language" in Lee's face and refused to leave. (Doc. 10-3 at 57, 62). As Lee tried to place Wilson under arrest, Wilson charged another officer and attempted to grab the officer's handgun. (Doc. 10-3 at 58-59, 63). A struggle ensued, and Wilson ultimately had to be pepper sprayed. (Doc. 10-3 at 59-60). After the confrontation, Wilson was arrested and charged with failure to leave campus as directed by an officer and felony obstruction of an officer. (Doc. 10-3 at 59-62). Wilson pled guilty to the charges and was banned from the campus. (Doc. 10-7 at 56-59).

Steven Roberts, formerly a law enforcement officer with the Georgia College Department of Public Safety, testified that on August 1, 1995, Wilson was charged with driving the wrong way on a one-way street and, because he ran when officers approached his car, obstruction of an officer. (Doc. 10-4 at 9-11). Roberts also testified he saw Wilson on the Georgia College campus on September 28, 1995. Knowing he had been banned from the campus, Roberts approached Wilson to arrest him for trespassing. When instructed to place his hands on the car, Wilson ran. (Doc. 10-4 at 3-5).

Maxine Blackwell, Solicitor of Baldwin County State Court, testified Wilson had been charged with

approximately ten misdemeanor offenses during an eleven week period in 1995 and was sentenced to serve 60 to 120 days in a detention center. (Docs. 10-4 at 20-21; 10-7 at 56-78).[37]

Blackwell testified that on April 2, 1996, just a few days after Parks's murder, Wilson appeared at her office. (Doc. 10-4 at 19-23). Aware there was an outstanding warrant for Wilson's arrest for Parks's murder, Blackwell had her secretary call law enforcement. (Doc. 10-4 at 23-24). Chief Deputy Sills and Deputy Blenk arrived moments later and arrested Wilson. (Doc. 10-4 at 27).

Blenk testified that when he arrested Wilson, he had 22 small zip-lock bags of marijuana in his front pocket.[38] (Doc. 10-4 at 34). Blenk stated that in a subsequent search of Wilson's residence, officers searching Wilson's bedroom found two shotguns (one of which was sawed-off), a photograph of a gang member displaying gang hand signs, a loaded Smith and Wesson .32 caliber revolver, a .36 caliber handgun, notebooks and folders of FOLKS gang information, zip-lock bags inside a larger zip-lock bag, ammunition, and a black ski mask with two cut-out eye holes. (Doc 10-4 at 36, 41-42).

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[37] Records tendered into evidence at the state habeas court hearing show Wilson was released from the detention center on February 28, 1996. (Doc. 12-15 at 17).

[38] Shawn Davis, a forensic chemist with the Georgia Bureau of Investigations, confirmed the substance taken from Wilson's right front pocket was marijuana. (Doc. 10-4 at 63).

During the guilt phase of Wilson's trial, gang references had been redacted from Wilson's recorded statements. In the sentencing phase, the State played the redacted portions. The jury heard Wilson confess he joined the Milledgeville FOLKS gang during his incarceration (Doc. 10-4 at 73, 77); he was as high as he could be in the gang, although not the leader (Doc. 10-4 at 73); he had one person under him in the gang but could have as many members as he wanted under him (Doc. 10-4 at 77); there was no reason for him to kill Parks to move up in the gang ranks because he was already as high as he could be (Doc. 10-4 at 77); and Butts was a member of the other FOLKS gang located in Milledgeville (Doc. 10-4 at 74). Wilson said his position in FOLKS was "the God damn chief enforcer," a designation he earned by "fighting and stuff like that" when he was incarcerated in the YDC.[39] (Doc. 10-4 at 77-78).

Trial counsel called six witnesses in the sentencing phase. The testimony of three witnesses, Sills, Blenk, and Sheriff Massee, supported trial counsel's theory that Butts shot Parks. (Doc. 10-5 at 14-16, 34, 38, 61, 77-78, 81-86, 89). Trial counsel called Butts, and he invoked his Fifth Amendment right to remain silent

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[39] After the jury heard Wilson's statement regarding his membership and status in the FOLKS gang, Sills and Deputy Ricky Horn provided testimony regarding gangs in general and the FOLKS gang located in Baldwin County, Georgia in particular. (Docs. 10-4 at 99-142; 10-5 at 1-7). Wilson maintains trial counsel were ineffective for failing to object to or rebut Sills's and Blenk's testimony. (Doc. 43 at 130-98). The Court discusses that ineffectiveness claim below.

when asked if he remembered confessing to three cellmates[40] he shot Parks. (Doc. 10-5 at 69).

Kohanski testified trial counsel employed her to determine Wilson's competency to stand trial and to "look at [Wilson's] background to see if [she] could come up with some sort of understanding for all of us as to how the circumstances came to be." (Doc. 10-5 at 99). She then testified at length about Wilson's background, primarily based on her review of the records trial counsel had obtained.

Kohanski testified Wilson began displaying aggressive and inappropriate behavior as early as the first grade, which led school officials to request a psychological assessment. (Doc. 10-5 at 100). Wilson had difficulty staying on task, suffered from a poor self-image, and displayed "excessive maternal dependence." (Doc. 10-5 at 101). School officials requested a medical evaluation, which was never done, to determine the cause of his problems. (Doc. 10-5 at 101-02). Based on his behavior, school officials suspected he suffered from an attention deficit disorder but he was never diagnosed with the disorder because his mother did not follow the recommendation he be tested. (Doc. 10-5 at 103-04).

Wilson's home life was "extraordinarily chaotic." (Doc. 10-5 at 102). Wilson's mother provided little supervision, and there was no male supervision. He lived

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[40] The cellmates' names were Horace May, Shawn Holcomb, and Randall Gary Garza (also shown as Gary Randall Garza). (Doc. 10-5 at 70, 81).

on the street and began fending for himself at age nine or ten. (Doc. 10-5 at 103-04). This lack of family guidance led him to associate with a gang. (Doc. 10-5 at 104).

Cox's boyfriends "came and went" during Wilson's childhood, and drug use in the home was commonplace. (Doc. 10-5 at 103). The one boyfriend who was a father figure to Wilson "behaved in extremely dangerous ways." (Doc. 10-5 at 104). When Wilson was six or seven, he saw this man put a gun to his mothers head, which "apparently was not an uncommon event in th[e] household." (Doc. 10-5 at 104).

Because he was biracial, Wilson experienced "considerable conflict" in the neighborhood in which he grew up where "identity was extremely important." (Doc. 10-5 at 102-03). Although he identified himself as African-American, he "had a white mother whom he loved dearly." (Doc. 10-5 at 103).

On cross examination, Kohanski testified Wilson knew right from wrong at the time of the murder and that he was not acting under any delusional compulsion. (Doc. 10-5 at 109-10). She admitted there was no history of organic brain damage. (Doc. 10-5 at 112, 120). However, she noted Wilson had been in two car wrecks when he was younger, and she "would have been interested to see if there had been a MRI or CAT scan done at the time, but [they didn't] have those records." (Doc. 10-5 at 112, 121). Kohanski acknowledged early I.Q. tests revealed Wilson had an average I.Q.

and conceded many biracial children lead successful lives. (Doc. 10-5 at 114-16, 118).

Cox then testified Kohanski's testimony accurately reflected Wilson's life, and Wilson had a difficult time with his identity. (Doc. 10-5 at 127-28). She said she worked menial jobs most of her life and made very little money. (Doc. 10-5 at 128-29). She explained Wilson had no male guidance, and his father refused to have anything to do with him. (Doc. 10-5 at 128). Cox testified that other than Wilson, her father was her only family, and he would not associate with her because Wilson's father was African-American. (Doc. 10-5 at 129). Cox testified Wilson had an eighteen-month-old daughter. She asked the jury to "spare his life and give him the chance to be with his daughter." (Doc. 10-5 at 131).

On cross examination, Cox admitted she had a difficult time controlling Wilson and had to call authorities on several occasions. (Doc. 10-5 at 132). She also confirmed most of the testimony from the State's witnesses about Wilson's criminal history. (Doc. 10-5 at 135). Finally, Cox testified Wilson was arrested for Parks's murder 24 days before his daughter was born and had been incarcerated ever since. (Doc. 10-5 at 137-38).

In closing, O'Donnell said he was "not [t]here to submit that . . . Wilson led any kind of life but a bad one[,]" and he acknowledged Wilson's "juvenile days were not his best days." (Doc. 10-6 at 21, 26). O'Donnell

argued Butts was the shooter and that Butts lied during his statement to law enforcement and later bragged to fellow inmates he was the person who shot Parks. (Doc. 10-6 at 24, 40). O'Donnell asked the jury to "think about what happened in [Wilson's] life." (Doc. 10-6 at 27-28). He joined a gang because he never had a family and had been living on the streets since he was eleven years old. His mother's family would not accept him because he was biracial, and his father simply did not want him. (Doc. 10-6 at 27-28). O'Donnell pointed out that, except for Wilson's mother, all of the people who testified and knew Wilson during his youth were in prison, illustrating the violent environment in which Wilson grew up. (Doc. 10-6 at 29-30). O'Donnell argued a sentence less than death was appropriate because Wilson did not shoot Parks, and Wilson told authorities the truth about what happened the night of the murder. (Doc. 10-6 at 40-41).

The jury returned a death sentence in less than two hours. (Doc. 10-6 at 51-52).

ii) The mitigation evidence in the state habeas court proceedings

The state habeas court's evidentiary hearing was "primarily devoted to . . . Wilson's claims of ineffective assistance with respect to trial counsel's penalty phase preparation and presentation." (Doc. 43 at 18). State habeas counsel presented nine witnesses, five of whom

provided mitigation testimony.[41] They also submitted 127 exhibits, including affidavits and depositions from several of Wilson's family members, friends, teachers, social services worker, and mental health experts.

Georgia Bell Hightower, Wilson's first grade school teacher, described Wilson as talkative and disruptive and felt he was starving for love and attention because he was neglected by his unkempt mother. (Doc. 12-7 at 11, 13, 15, 17). She testified Wilson lived in a rough, drug-infested neighborhood, where he roamed the streets with no parental supervision. (Doc. 12-7 at 20). She opined Wilson had much potential, and his life would have turned out differently had he received love and support. (Doc. 12-7 at 22, 24).

Helen McCloud Watkins, a friend of Wilson's family, testified she considered Wilson to be her nephew because her brother was like a father to Wilson throughout his life. (Doc. 12-7 at 34). She stated that when Wilson was a baby, his mother lived with a man named Pat Kimp in a dilapidated rental home lacking electricity or running water. (Doc. 12-7 at 35-36). The house reeked because they urinated into plastic milk jugs and two liter soda bottles they kept in the house. (Doc. 12-7 at 36-37). Watkins stated that when Wilson was a toddler, she took him to her home because Cox

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[41] Wilson's remaining witnesses were O'Donnell and three witnesses who testified regarding gangs in general and the FOLKS gang in Baldwin County in particular. (Doc. 12-5 to Doc. 12-8).

and Kimp were involved in an altercation.[42] (Doc. 12-7 at 36). She testified Wilson lived with her for three to six months, during which time his mother only visited him once or twice. (Doc. 12-7 at 41). Cox retrieved Wilson only after Kimp learned Cox's public assistance might be discontinued because she no longer had physical custody of the boy. (Doc. 12-7 at 41).

Watkins said that after leaving Kimp, Cox moved in with McCloud. (Doc. 12-7 at 54). Both Cox and McCloud had jobs, but when not at work, McCloud abused drugs and alcohol while Cox played Nintendo and worked puzzles instead of caring for her child or cleaning her filthy house. (Doc. 12-7 at 44-48, 54). According to Watkins, Cox had no rules for Wilson and did not supervise him at all. (Doc. 12-7 at 46).

Watkins testified Cox later moved in with another alcoholic, Sullivan, who was physically abusive to Wilson by either "spanking him or hurting him." (Doc. 12-7 at 50). On cross examination, Watkins acknowledged she had never seen any of this physical abuse, and she did not report the alleged abuse to authorities. (Doc. 12-7 at 54-55).

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[42] According to Cox, the altercation was actually between her and some unknown person who broke into their home and attempted to rape her. (Doc. 12-10 at 61).

Vivian Amason, a former social service specialist with McIntosh County DFCS, testified that on November 19, 1991, Marie Aldridge with the DJJ[43] notified McIntosh County DFCS that Cox was not providing Wilson with adequate supervision, clothing, or food. (Docs. 12-7 at 65-67; 12-16 at 9-58). At the time, Cox was living with Sullivan, who abused alcohol and drugs. (Doc. 12-7 at 68, 71). She testified Sullivan may have been abusive to Wilson,[44] but DFCS never confirmed any physical abuse. (Doc. 12-7 at 91). She testified Cox was neglecting Wilson, who was running away from home, skipping school, and having a difficult time socially because he was biracial.[45] (Doc. 12-7 at 68, 71). Amason described Wilson as a polite, respectful, and intelligent child who accepted responsibility for his actions, wanted to do better, and wanted to live in a stable environment with his mother. (Doc. 12-7 at 69, 79-80). Amason testified that DFCS confirmed the neglect allegations and found Cox was not providing Wilson with "nurturing, care, guidance, and . . . food." (Docs. 12-7 at 69; 12-16 at 35). She stated Wilson was

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[43] The DJJ became involved with fifteen year old Wilson in November 1991 because he had been charged with "unruly-runaway," loitering and prowling. (Doc. 12-9 at 48).

[44] DFCS records show Wilson reported Sullivan drinks and "had hit him." (Doc. 12-16 at 12).

[45] Amason's records from December 1991 show Amason contacted Cox who told her Wilson was hanging around the wrong crowd, getting into trouble, cutting school, leaving home without telling her, and that Cox did not know what to do with him. (Doc. 12-16 at 36). The records also show Cox told Amason that Wilson can be lovable when he gets what he wants but "can be nasty when things do not go his way." (Doc. 12-16 at 36).

at risk while he was in the home, but DFCS could not continue services because he was incarcerated in the juvenile court system.[46] (Doc. 12-7 at 70, 88).

Amason further testified the McIntosh County Juvenile Court ordered DFCS to contact Cox again in October 1992, and she found the home situation had improved considerably. Cox's mental functioning had also improved, and she was willing to assume responsibility for Wilson, who wanted to live with his mother. (Docs. 12-7 at 73, 89-90; 12-16 at 41). In an October 29, 1992 letter to the McIntosh County Juvenile Court, Amason recommended Wilson remain in Cox's custody.[47] (Docs. 12-7 at 74; 12-16 at 41). However, the court disagreed and wanted to place Wilson in foster care. (Doc. 12-7 at 74-75). According to Amason, no foster homes or other facilities for troubled teenage boys were available. (Doc. 12-7 at 75). Amason testified that shortly after Wilson returned home in October 1992, he again got into trouble because he had no structure, guidance, or stability at home. (Doc. 12-7 at 78, 93-94).

On cross examination, Amason admitted Wilson knew he was behaving badly and knew he could do better. (Doc. 12-7 at 84). She also admitted DFCS would

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[46] Wilson had been incarcerated for charges stemming from his December 16, 1991 shooting of Valle. (Doc. 12-16 at 17).

[47] Actually, the record shows Wilson was not in Cox's custody on October 29, 1992. He was incarcerated, having been charged with simple battery after his unprovoked attack on a boy at a ballgame. (Docs. 12-9 at 43; 12-16 at 41). Cox stated she wanted custody of Wilson following his release from confinement, and Amason agreed she should have custody. (Doc. 12-16 at 41).

not put a child back into an unstable or dangerous home. (Doc. 12-7 at 88-89). Amason confirmed Wilson, in October 1992, stated his mother tried to take care of him but he "usually gets himself into trouble" and his mother "never abused him." (Doc. 12-16 at 24, 41). Amason also acknowledged that, in her October 29, 1992 letter, she told the McIntosh County Juvenile Court Wilson did not "appear to be in danger of maltreatment in his mother's home[,]" and Wilson was sixteen years old and needed to be held accountable for his actions.[48] (Docs. 12-7 at 90; 12-16 at 41).

Adam Poppell, an attorney, testified he was appointed to represent Wilson in McIntosh County Juvenile Court in 1992.[49] (Docs. 12-7 at 107-09; 12-9 at

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[48] In this letter, Amason also reported: "Ms. Cox says that Marion is very sensitive and tends to fight at the slightest insult." (Doc. 12-16 at 41).

[49] It is unclear exactly what charges were pending against Wilson when Poppell was appointed to represent him. A January 3, 1992 "case-worker's report" from Marie Aldridge with the DJJ shows Wilson was charged with three separate unruly-runaway offenses because he ran away from home once in September 1991 and twice in November 1991; three counts of loitering and prowling; and one criminal attempt to commit armed robbery and aggravated assault, which stemmed from Valle's shooting. (Doc. 12-9 at 43, 48). An update, dated October 30, 1992, shows Wilson received probation for the unruly-runaway and loitering and prowling charges on March 20, 1992. (Doc. 12-9 at 47). The update shows he was charged with, and received probation for, one count of simple battery, and the criminal attempt to commit armed robbery and aggravated assault charges were dead docketed because Valle could not be located. (Doc. 12-9 at 47). Finally, the update shows Wilson was currently "charged with simple battery for an incident that occurred October 16, 1992, when he hit the victim, Ryan Mauldin, in the head causing a severe cut over the left eye.

43-50). He described Wilson's mother as an unkempt woman who could barely function and who never kept appointments. (Doc. 12-7 at 107-09). He said Cox, Sullivan, and Wilson lived in a dilapidated home in a poor neighborhood, and Cox failed to supervise or adequately care for Wilson. (Doc. 12-7 at 110-11). He stated that Wilson, who was a quiet child, did not like living with Sullivan, who was known in the community as a violent drug dealer. (Doc. 12-7 at 115-16, 126). Consequently, Wilson ran away from home frequently and essentially lived in the streets. (Doc. 12-7 at 115-16). According to Poppell, Wilson had potential and "was one of the more unusual kids in that he was relatively intelligent." (Doc. 12-7 at 122).

Lorr Elias, a DJJ regional administrator who had worked at the DJJ for 21 years, reviewed Wilson's school records, DFCS records, court documents, affidavits, and hospital records. (Doc. 12-7 at 132, 138). Elias testified that every risk factor for becoming a serious juvenile offender was present in Wilson's life – poor home support; absence of a stable positive role model; long term neglect or abuse; family mobility; exposure to violence, drugs, and sex; poverty; and constant turmoil. (Doc. 12-7 at 142). Elias was not surprised DFCS did not remove Wilson from his mother's home because DFCS had failed on many occasions to remove deprived children from their homes, and in any event, there was no place to put teenagers when they did remove them. (Doc. 12-7 at 145). She opined Wilson

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Evidence indicates the incident was unpro[vo]ked. No weap[o]n was found." (Doc. 12-9 at 43).

wanted to do better and responded well to structure, which is why the DJJ took the unusual step of releasing him early from the Milledgeville YDC to allow him to attend classes at GMC. (Doc. 12-8 at 6, 8-9). She explained that the DJJ was required by law to intensively supervise Wilson, as a high risk offender or a designated felon, after his early release until he reached age 21. (Doc. 12-8 at 8, 21, 25). However, Wilson never received this supervision because his case was not transferred from McIntosh County to Baldwin County. (Doc. 12-8 at 7, 9-11, 25-26).[50] Thus, Wilson was not supervised after his November 15, 1995 release to March 28, 1996. (Doc. 12-8 at 9-10, 25). Elias explained that, without supervision, Wilson slipped back into the only lifestyle he knew – hanging around with the wrong people, roaming the streets, and getting into trouble. (Doc. 12-8 at 5-6). She testified that had he been properly supervised, Wilson's community placement would have been revoked before he became involved in Parks's murder because of his many offenses. (Doc. 12-8 at 13). Elias opined this "early intervention" may have been effective because, although he was a chronic offender, Wilson showed hope and promise not usually seen in similar offenders. (Doc. 12-8 at 13).

On cross examination, Elias admitted she had given this "expert opinion sort of testimony" in only one

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[50] In an affidavit submitted at the state habeas hearing, Nancy Rogers explained she worked as a case manager at the DJJ, and in April 1996, she received a written reprimand for failing to adequately and properly supervise Wilson from November 15, 1995 until late March 1996. (Doc. 12-13 at 5-6).

other case. (Doc. 12-8 at 14, 21-22). In that case, she was very familiar with the child because she had supervised him, whereas she had no personal knowledge of Wilson, his mother, or any of his family members. (Doc. 12-8 at 15-16).

In addition to this testimony, state habeas counsel submitted affidavits from Wilson's family members, friends, acquaintances, teachers, and social workers. These affiants confirmed and provided additional details about Wilson's troubled childhood and adolescence. (Docs. 12-10 at 57-58, 84, 87, 100; 12-11 at 3-4; 12-9 at 9-10, 28; 12-10 at 96-98). They provided more details of the filthy and dangerous conditions in which Cox and Wilson lived and described Wilson as a sickly, fragile child who was often forced to go without clothes or food. (Docs. 12-10 at 60, 71-72, 85, 94, 96-97; 12-11 at 7). They provided additional details about the numerous abusive relationships Cox had with multiple alcoholic, drug-abusing men. (Docs. 12-10 at 60, 63, 71-72, 75, 77, 91, 94, 96; 12-11 at 5-7).

From Cox's affidavit, there is some evidence Wilson may have suffered physical abuse. Cox claimed that when she and Wilson lived with her father in Oklahoma for several months in 1985 or 1986, her father beat Wilson with a belt. (Doc. 12-10 at 65). She stated one of her boyfriends threatened Wilson, hit Wilson, and once pulled a knife on Wilson. (Doc. 12-10 at 65-66). She also alleged Sullivan "sometimes would hit [Wilson]." (Doc 12-10 at 66). Ray Charles Ellis claimed Cox told him "her boyfriend [Sullivan] did a lot of drugs, drank a lot and he would often beat her and

[Wilson]." (Doc. 12-11 at 5). Kimp stated that when Wilson "acted up, [he] would sometimes have to take [his] hand or belt to him." (Doc. 12-10 at 91). Another affiant, Belinda Wilson, claimed that when Kimp "got in one of his moods, he used to beat . . . [Wilson] really bad" by slapping or punching him. (Doc. 12-11 at 7-8).

Affidavits provided evidence that when Wilson was about fifteen years old, he and his mother moved into a stable home environment with his aunt, Evelyn Gibbs. (Doc. 12-10 at 67, 81-82). While in this environment, Wilson did well in school and stayed out of trouble. (Doc. 12-10 at 68). In her affidavit, Kohanski explained Wilson's success at Gibbs's home showed a structured environment would "significantly ameliorate the kinds of behavior problems seen in . . . Wilson." (Doc. 12-9 at 69-70).

Four former teachers submitted affidavits.[51] (Doc. 12-9 at 7-42). They testified Wilson was easily led, always anxious, hyperactive, energetic, incapable of focusing, likeable, and suffered from identity issues. They stated Wilson had potential, was creative and intelligent, and his life would have turned out differently if he had the support, love, and attention all children need. (Doc. 12-9 at 7-12, 25-27, 38-40). Bazzle explained the school psychologist recommended placing Wilson in the behavior disorders program and that he

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[51] These teachers were Hightower, Wilson's first grade teacher who also testified at the state habeas evidentiary hearing; Joan Bazzle, another elementary school teacher; Barbara Smith, Wilson's eighth grade teacher; and Moye, an English teacher at GMC. (Doc. 12-9 at 7-42).

have a medical checkup to see if he could receive medication for ADD. (Doc. 12-9 at 40). However, Cox and McCloud would not allow him to be placed in the behavior disorders program and did not take Wilson for a medical checkup. (Doc. 12-9 at 40). Melanie Moye, a GMC teacher, testified Wilson stood out in her college English class because of his intelligence and "strong effort to do well." (Doc. 12-9 at 18). She opined Wilson wanted to "change his life and use his abilities to better himself." (Doc. 12-9 at 18). She described him as personable and pleasant and stated he had a "warm and tender side." (Doc. 12-9 at 19).

Wilson also presented affidavits from Dr. Jorge A. Herrera, a forensic neuropsychology expert.[52] (Doc. 12-9 at 91). In his February 25, 2002 affidavit, Herrera said he reviewed records, interviewed Wilson, and administered neuropsychological tests. (Doc. 12-9 at 91-92). Herrera diagnosed Wilson as having frontal lobe brain damage and ADHD. (Doc. 12-9 at 97-99). According to Herrera:

> The neuropsychological testing . . . revealed mild to severe impairments in brain functioning, with severe impairment localized in the frontal lobes of Mr. Wilson's brain. This is an area of the brain which governs executive functions such as judgment, decision-making, abstract reasoning and planning skills, as well as impulse-control. It is my professional opinion that Mr. Wilson's impairments are

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[52] In several places in the record, Herrera's name is shown as Dr. Jorge Alfredo Herrera-Pino. (Doc. 12-10 at 2).

> developmental in nature, possibly stemming from toxic exposure during the mother's pregnancy or other pre or perinatal trauma and/or malnutrition and chronic illness/high fevers associated with the poor conditions of Mr. Wilson's childhood home environment. Early life closed head trauma could also have contributed to these impairments. Mr. Wilson's impairments are consistent with the symptoms of attention-deficit/hyperactivity disorder observed from Mr. Wilson's early childhood. Untreated, these impairments can adversely affect an individual's ability to make proper life choices and to control impulsive behavior. Such individuals also tend to be more susceptible to suggestion than normally functioning individuals. In Mr. Wilson's case, these impairments were exacerbated by Mr. Wilson's life history of childhood poverty and deprivation, a total lack of parental nurturing, guidance and supervision, and difficulties stemming from the struggles with his lack of a father figure and his mixed-race identity.

(Doc. 12-9 at 92).

Herrera explained Wilson had adequate intelligence, but his "problems lie in the area of social judgment and decision-making." (Docs. 12-9 at 103; 16-2 at 16). Herrera theorized Wilson's association with Butts on the night of the murder and his failure to intervene are consistent with the concrete thinking and judgment problems associated with his severe frontal lobe impairment. (Doc. 12-9 at 103). Herrera found, "Wilson is a damaged individual whose problems are directly

related . . . both to his impaired brain functioning and ADHD, and to his traumatic and disadvantaged life history." (Doc. 12-9 at 103).

Wilson presented affidavits from Kohanski and Maish. Kohanski agreed with Herrera's findings that Wilson suffers from frontal lobe brain damage and ADHD. (Doc. 12-9 at 60, 76-77). Maish testified that after reviewing Wilson's records and Herrera's neuropsychological testing results, he did not believe Wilson to be a psychopath or a sociopath. (Doc. 12-10 at 22). He found Herrera's testing methods and results sound and concurred in the diagnosis of ADHD and frontal lobe impairment. (Doc. 12-10 at 20-21, 34, 38-39). He stated Wilson's "troubled juvenile and criminal history was . . . virtually guaranteed" by Wilson's ADHD and frontal lobe impairment paired with his highly dysfunctional upbringing. (Doc. 12-10 at 20). Like Herrera, he opined Wilson's frontal lobe impairment significantly impacted his ability to fully comprehend the consequences of his actions, impeded his ability to make judgments, and hampered his ability to control impulses. (Doc. 12-10 at 22).

iii) The state habeas court's conclusion that Wilson was not prejudiced by trial counsel's investigation and presentation of mitigation evidence

The state habeas court concluded Wilson's new mitigation evidence, both lay and expert, would not

have changed the outcome of his trial. With regard to new lay testimony, the court found:

> Petitioner claims that defense counsel failed to interview certain potential mitigation witnesses. However, this Court finds that trial counsel were not deficient in not submitting this additional testimony and further finds that Petitioner has not established prejudice as the testimony proffered in support of this claim would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability changed the outcome of the trial.
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> . . .
>
> As to the testimony of Petitioner's former teachers, this Court finds this evidence speculative and notes the limited contact these teachers had with Petitioner and/or the lapse in time between their contacts with Petitioner and the crimes. Thus, while the testimony of Petitioner's former school teachers, including Ms. Gray's testimony, would have been largely cumulative of other evidence at trial, or otherwise inadmissible on evidentiary grounds, even assuming its admissibility, the Court finds that Petitioner has failed to show that 'rial counsel were deficient in not submitting this testimony or that the testimony would have a reasonable probability of changing the outcome of the case.
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> . . .

> This Court also finds that the remainder of Petitioner's lay affiants, like the aforementioned affiants, provide testimony that would not have been admissible at trial as the testimony is largely based on hearsay or speculation or was cumulative of testimony elicited by defense counsel from Petitioner's mother and Dr. Kohanski at trial concerning Petitioner's childhood. Further, given the defense theory that Butts was the triggerman, trial counsel were reasonable in declining to proffer the testimony that undermined that defense, and there is no reasonable probability that such additional testimony would have changed the outcome of the case. . . .

(Doc. 18-4 at 23-26) (record citations omitted).[53]

With regard to new expert testimony, the court summarily found it would not have changed the outcome of the trial. (Doc. 18-4 at 26).

Wilson generally complains the state habeas court failed to explain its prejudice determination. "Instead of engaging in a 'probing' and 'careful' analysis, the state habeas court here simply relied on the bald recitations of the 'magic words' of the *Strickland* standard in concluding that Mr. Wilson was not prejudiced."

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[53] In its prejudice analysis, the state habeas court discussed the affidavit testimony of Eric Veal, who said Parks's murder was not gang-related. Wilson makes no allegations regarding Veal in his briefs and thus does not contend the state habeas court erred when it concluded Veal's testimony was inadmissible and, in the alternative, would not have, with any reasonable probability, changed the outcome of Wilson's trial.

(Doc. 43 at 108). This argument is without merit. A state court is not required to "show its work" or provide rationales and explanations for its decisions. *Richter*, 131 S. Ct. at 784; *Evans*, 703 F.3d at 1329-30. This Court focuses on the ultimate legal conclusion reached by the state court, "not on whether the state court considered and discussed every angle of the evidence." *Lee*, 726 F.3d at 1211. If there is no conspicuous misapplication of federal law, this Court must assume the state court knows and follows the law. *Evans*, 703 F.3d at 1329-30.

Moreover, at least with regard to Wilson's new lay testimony, the state habeas court did somewhat explain its reasoning. For example, it found the teachers' testimony speculative, noting "the limited contact these teachers had with [Wilson] and/or the lapse in time between their contacts with [Wilson] and the crimes." (Doc. 18-4 at 24). Wilson, who was 19 when Parks was murdered and 21 at the time of his trial, had not seen his elementary school teachers in years. (Doc. 12-7 at 28). Additionally, he spent no more than one school year with each of the elementary or middle school teachers and only one semester in Moye's college class. (Doc. 12-9 at 7-42). Moye, his college level teacher, acknowledged she was unable to spend much time with Wilson. (Doc. 12-9 at 20).

Wilson argues that by ruling the teachers' testimony speculative, the state habeas court effectively found childhood or adolescent evidence is never "persuasive." (Doc. 43 at 111). Similarly, Wilson argues the state habeas court's broad and sweeping conclusion

that all of the new lay testimony was inadmissible was unreasonable.[54] While, much of the lay testimony was speculative, much was not, and Wilson's argument would have some merit if the state habeas court had simply rejected all the lay testimony as speculative. But that is not what the court did.[55] The court examined the testimony and found it largely cumulative of Kohanski and Cox's trial testimony. (Doc. 18-4 at 25, 31). Kohanski, based primarily on her review of the

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[54] Wilson cites *Green v. Georgia*, 442 U.S. 95, 97 (1979) and *Sears v. Upton*, 130 S. Ct. 3259, 3263 n.6 (2010) to support his argument that hearsay evidence is admissible for penalty phase purposes. In *Green*, the Court held it violated due process to exclude as hearsay a codefendant's confession that he alone committed the murder for which the defendant was charged. *Id.* at 97. In *Sears*, the Court did not hold it was always legal error to exclude hearsay testimony during the penalty phase of a capital trial. To the contrary, it specifically stated it took "no view on whether the evidence at issue would satisfy the considerations . . . in *Green*." *Id.* at 3263 n.6. The hearsay testimony at issue in Wilson is not the "highly relevant" and "sufficiently reliable" statement exonerating a defendant. *Green*, 442 U.S. at 97. Instead, it is the type of self-serving affidavit testimony that normally proves of little significance. *Putman*, 268 F.3d at 1245 n.19 (quoting *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995)). Thus, there are no due process issues present here.

[55] Some of the more glaring examples of speculative testimony from the teachers are: Wilson would not have turned to destructive behavior if he had love and support; Wilson might not have ended up in these circumstances if he had good parents or a good home; with guidance and support Wilson could have accomplished great things; an authority figure or strong father figure could have made a big difference in Wilson's life and prevented his criminal activity; and with sustained intervention Wilson might have modified his behavior and flourished. (Doc. 12-9 at 10-11, 20-21, 41).

records counsel obtained, and Cox testified about Wilson's background.[56] (Doc. 43 at 117).

Citing *Cooper v. Sec'y, Dep't of Corrs.*, 646 F.3d 1328 (11th Cir. 2011), Wilson argues the state habeas court unreasonably applied *Strickland* when it found the new evidence cumulative. Close examination of *Cooper* is instructive.

In Cooper's trial, his mother, Kokx, described the physical abuse, much of which Cooper witnessed, she suffered at the hands of Cooper's father, Phillip. *Cooper*, 646 F.3d at 1337. She testified Phillip neglected Cooper, was not very affectionate to Cooper, used profanity when speaking to Cooper, and was "very hard" on Cooper, disciplining him with a belt that left marks. *Id.* at 1337-38. The jury recommended the death penalty.

At the state postconviction hearing, Cooper's brother and sisters testified at length and in detail about the daily abuse Phillip inflicted upon his children. Phillip, who was an alcoholic, beat them nearly every day with boards, fists, belts, switches, or horsewhips, began punching Cooper when he was barely out of diapers, picked them up and slammed them against walls, banged their heads together, threw rocks at

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[56] Wilson argues Kohanski and Cox presented only a "hollow shell" of his tragic life history, while the new lay testimony provides a graphic and detailed description of that history. On a practical level, this is a reasonable point. The live testimony of those who knew Wilson might have been more persuasive than Kohanski's regurgitation of facts she culled from records.

them, and threatened to shoot them when they tried to run away. *Id.* at 1342-44. Cooper's older brother testified both he and Cooper attempted suicide to escape their father's abuse. *Id.* at 1343. His sister testified that because Phillip often made Cooper go without food, he would sneak to a barn to eat dog food and drink milk from a nursing mare. *Id.* at 1344. Witnesses also testified that after Phillip's death, Cooper's older brother began physically abusing Cooper on a daily basis. *Id.* at 1345.

The state postconviction court denied relief, finding that trial counsel's performance was reasonable and that Cooper failed to show prejudice because the additional evidence regarding Cooper's background was cumulative of the evidence presented at trial by Cooper's mother, and the Florida Supreme Court affirmed. *Id.* at 1348-49. The Eleventh Circuit disagreed: "Although Kokx's testimony revealed that Cooper's home life was volatile; to characterize her testimony as revealing a 'substantial part' of Cooper's 'disadvantaged childhood' is a great exaggeration." *Id.* First, Kokx's testimony at trial explained how she, not Cooper, was physically abused by Phillip. *Id.* Second, she could not have testified about much of the abuse suffered by Cooper because she was not living with Phillip and Cooper much of the time. *Id.* Finally, she failed to reveal Cooper was physically abused by his older brother as well. *Id.* Thus, the Eleventh Circuit held the Florida Supreme Court's determination that the evidence presented postconviction was cumulative

to that presented at the sentencing hearing was an unreasonable determination of the facts. *Id.* at 1353. The Eleventh Circuit then reviewed *Strickland's* prejudice prong de novo and granted relief. *Id.* at 1353-56.

But in this case, even by *Cooper's* standards,[57] the state habeas court's determination that the lay witness testimony was cumulative was reasonable. "[E]vidence presented in postconviction proceedings is 'cumulative' or 'largely cumulative' to or 'duplicative' of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes." *Holsey v. Warden*, 694 F.3d 1230,1260-61 (11th Cir. 2012) (quoting *Cullen*, 131 S. Ct. at 1409-10). While Wilson's new lay witnesses provided the state habeas court with more details regarding his troubled background, their testimony "concerned the same 'subject matter' [as] the evidence presented at sentencing." *Id.* at 1263 (quoting *Paul v. United States*, 534 F.3d 832, 842-43 (8th Cir. 2008)). The jury heard Wilson was a sickly child who, starting in the first grade, had numerous problems in school; he may have had ADHD but his mother failed to have him tested to confirm this disorder; and as a biracial child, he suffered from identity and self-image problems. Because he was biracial, he and his mother were shunned by her family; his father had no relationship with him at all; his father never provided

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[57] The Eleventh Circuit has since characterized *Cooper* as an "outlier," questioning its treatment of the state court's cumulative determination as factfinding for purposes of 28 U.S.C. § 2254(d)(2). *Holsey*, 694 F.3d at 1259.

any financial support, and his mother worked at menial jobs making very little money; his home life was chaotic and difficult; his mother's many boyfriends used drugs in the home and were frequently violent; his mother provided no supervision; he had no male role models; and he was living on the streets by age nine or ten. (Doc. 10-5 at 102-04; 127-30).

In short, the new lay witness testimony did not tell a different story,[58] just a more detailed one. Thus, fair-minded jurists could find their testimony cumulative. Even if this Court "might reach a different conclusion in the first instance," it cannot find the state court's

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[58] The lay affiants provided some general testimony of physical abuse, i.e., Cox's father hit him with a belt and various boyfriends hit or beat him. (Docs.12-10 at 65-66, 91; 12-11 at 5-8). They failed to provide more than "generalities" about such abuse. *See Lee*, 726 F.3d at 1196 (explaining the petitioner could not show prejudice by stating only "generalities that his parents would frequently verbally abuse and berate him and sometimes whip him"). Certainly, there was no "powerful" mitigating evidence of severe physical torment or abuse. *Wiggins*, 539 U.S. at 534-38. Moreover, DFCS never confirmed any abuse (Doc. 12-7 at 91). Wilson himself repeatedly denied any physical abuse: He told Kohanski that he was never physically abused (Doc. 13-12 at 79); Central State Hospital records show that Wilson denied any physical abuse (Doc. 15-3 at 57); School records show Kimp "never abused" Wilson (Doc. 12-6 at 60); and Department of Corrections' records show Wilson denied any physical abuse. (Doc. 15-5 at 50). Some of the affiants also claimed Wilson went without adequate food and clothing. (Docs. 12-10 at 84; 12-11 at 7). However, this testimony was rebutted by his elementary school records, which show Wilson was "a handsome racially mixed child of average height and weight" who was "clean and well dressed" and later by Georgia Regional Hospital records, dated January 1992, which show Wilson was "well developed, well nourished, [and] healthy appearing." (Docs. 12-14 at 23; 12-16 at 62).

cumulative determination was so clearly erroneous that no fairminded jurist would ever agree with it. *Id.* at 1260; *see also Pinholster*, 131 S. Ct. at 1409-10 (if evidence presented postconviction "largely duplicate[s]" that heard by the sentencing jury, there is no prejudice); *Sochor v. Sec'y Dep't of Corr.*, 685 F.3d 1016, (11th Cir. 2012) (holding that a habeas petitioner does not establish prejudice when most of the mitigating evidence produced postconviction was cumulative of evidence produced during the trial).[59]

Moreover, the teachers' testimony would have opened the door to the admission of Wilson's school records, which contained evidence that would likely have been more harmful than helpful. (Doc. 43 at 113). For example, these records revealed Wilson was disruptive,

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[59] Wilson also cites *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008) to support his argument that the state habeas court's conclusion that lay witness testimony was cumulative of trial testimony was unreasonable. *Williams* is easily distinguishable. First, the trial court in *Williams* rejected a jury's recommendation and imposed a death sentence. In this situation, "'[p]rejudice is more easily shown . . . because of the deference shown to the jury recommendation.'" *Id.* at 1343 (quoting *Harich v. Wainwright*, 813 F.2d 1082, 1093 n.8 (11th Cir. 1987)). Also, Williams's new mitigation evidence "paint[ed] a vastly different picture" of Williams's background than the one portrayed at his sentencing. *Id.* at 1335. Finally, the state postconviction court greatly discounted the value of the new mitigation evidence because it had no "causal relationship" with the underlying murder. *Id.* at 1343-44. The Eleventh Circuit held the state court's emphasis on the absence of a causal relationship between the new mitigation evidence and the murder was an unreasonable application of *Strickland*. *Id.* *Williams* is both factually and legally distinguishable.

physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct. (Docs. 12-16 at 61-62, 67, 70; 12-17 at 4-5). When evidence is not clearly mitigating or would open the door to harmful evidence, prejudice has not been established. Thus, "it is reasonable to conclude that [Wilson] was not prejudiced [because] his mitigation evidence 'was a two-edged sword or would have opened the door to damaging evidence." *Evans*, 703 F.3d at 1327 (quoting *Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1294 (11th Cir. 2012)).

With regard to Wilson's new expert evidence, the state habeas court said nothing about Herrera and little about the results of his neuropsychological testing. In a single sentence, the state habeas court simply found Wilson's "current diagnoses of impaired frontal lobe functioning, which allegedly affects Petitioner's impulsivity and reasoning, and ADHD," would not have changed the outcome of Wilson's trial. (Doc. 18-4 at 26). Wilson takes issue with the court's summary rejection of his "extensive new evidence of organic brain impairment." (Doc. 43 at 26). But Wilson does not say much about the significance of his alleged brain damage or ADHD either. He essentially says only that the jury did not know he had brain damage. (Doc. 43 at 123). In the factual background section of his brief, Wilson said an expert such as Herrera would have "explained to the jury that the problems Mr. Wilson has with social judgment and decision making are attributable to and consistent with the organic brain impairments that the testing revealed." (Doc. 43 at 65-66).

"Discussion of those impairments could have shed light on [his] behavior on the night of the crime for which he was convicted, including why he may have been hanging out with the co-defendant." (Doc. 43 at 66) In yet another section of his brief, Wilson argues evidence of his "significant organic brain impairments . . . would have buttressed a 'mere presence' theory of the case, because it would have helped the jury understand why [he] may have been at the murder yet not had the maturity or reasoning skills to go to the police." (Doc. 43 at 26).

But helped how? What about Wilson's maturity and decision-making and reasoning skills would "shed light" on what he did, or did not do, the night of Parks's murder? In other words, what were the consequences and manifestations, according to Wilson's experts, of his alleged brain damage? One answer is found not in Wilson's briefs but in Kohanski's affidavit testimony. The neuropsychological testing, she says, "indicates that Marion suffers from frontal lobe deficits and is a highly suggestible individual, easily led by others in certain situations." (Doc. 12-9 at 76). After reviewing all the new information, she concluded "Marion's profile is more consistent with an individual who is led rather than someone who actively leads." (Doc. 12-9 at 76). Wilson, she said, is a "passive, distant, even dissociative adolescent." (Doc. 12-9 at 76).[60]

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[60] Similarly, Herrera opined Wilson was "easily led," "suggestible," and just fell in with the wrong crowd. (Doc. 12-9 at 101-02).

The suggestion that Wilson was a passive, highly suggestible, and easily led by others is in stark conflict with the facts. In elementary school, he disrupted class by hitting and picking on other children and talking back to teachers. (Docs. 10-2 at 96-99, 115; 12-17 at 4-9). By age twelve, he was threatening elderly neighbors. (Docs. 10-2 at 96-99, 115; 12-17 at 4-9). During his teen years, he assaulted his peers for no apparent reason, shot a small dog (again for no apparent reason), distributed drugs, and shot both Underwood and Valle. (Docs. 8-8 at 77; 10-2 at 24-26, 60-65, 90; 10-3 at 21-23; 38-39, 46-51; 12-9 at 47). When incarcerated in the Claxton RYDC, he attacked a youth development worker. (Doc. 10-3 at 46-47). During a later incarceration at the YDC, he joined a gang, where his willingness to fight helped him move up "as high as [he] can be" and earned him the title "God damn chief enforcer." (Doc. 10-4 at 77-78). He was the "obvious leader" of a group of young men who refused to leave a college campus, and he alone among the group attacked an officer. (Doc. 10-3 at 55-60). Wilson's January 12, 1996 letter to a fellow gang member, written while Wilson was in prison, perhaps best illustrates the problems with Kohanski's new opinion:

> [I]f you see that fool Andre Simons in jail tear his ass up, because when I got up here, he was here and he paid some nigga to sneak me, because of that shit, I did to his cousin Rico Simmons. So, if you see him get in his shit . . . I can't wait to get out because I got so much shit to take care of. I got to make sure that our Folk Family is proper, I got to tend to my ho's, and

I got to get fucced up. Yea, you know how we do it! I know you heard about that shoot-out with the South Side and them Boddie project nigga's. I guess you know that Manice and Jarmaine Reanes got shot. I'm telling you folk, when I get out it ain't go be none of that hoe shit, them nigga's will die before they try the Manor, Folks, and the whole South Side again! You know that I ain't with that shit, and they know it.

Folk, it's 1996, and it our year to come up and make our nation stronger. We got to wise up and look at the future of our nation. You know it's all about that Money, Mackin, Murder, and that should be our main priority; We should be making more money, macking more ho's to make more Queens, and murdering all that oppose our nation, but only when necessary. We can't rise if we can't stay out of jail and prisons, and shoot outs and shit. None of that will help our nation. You see what I'm saying. We're supposed to be organized crime, not crime. This is true knowledge from a real G's head. . . . When I get out, I'm going to pull things together. I already know the ropes of this game. . . . I'm going to make it happen, and when I get through, Milledgeville is going to have a set of folks that's strictly legit and untouchable. You'll see! However, I can't do it by myself, although I know the proper procedures, I still need help from the other G's, so that we can bring this nation together quickly and properly. You know what I'm saying. I'm just letting you know that is fixing to blow-up like world trade center. It's on! It's all about

> Folks, and that 6 pointed nation in "1996", and this shit is real, so be prepared to help bring your nation to the top. Be prepared to rise with your nation or die with your nation. . . .

(Doc. 15-14 at 32-33).[61] Given this evidence, this Court finds it difficult to believe opinion testimony that Wilson was passive and easily led as the result of brain damage would have gained much traction with the jury.

In any event, Herrera's findings were questionable, which in turn rendered Kohanski's and Maish's testimony questionable as well.[62] Herrera acknowledged Wilson's scores for attention, ability to focus, distractibility, and impulsiveness would be considered within normal range by many psychologists and that no previous psychologist or psychiatrist had diagnosed Wilson with ADHD or found any brain damage. (Doc. 16-2 at 16-47, 58, 67 75). He also acknowledged Wilson's scores on most of the tests would be considered within the normal range if judged by published authoritative neuropsychological guidelines. (Doc. 16-2 at 16, 18, 22, 24, 26-27, 29-32, 35-38, 44-47). But Herrera

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[61] Although the State did not introduce this letter at trial, it certainly would at any retrial. *See Wong*, 558 U.S. at 20 (when determining prejudice it is necessary to consider all the relevant evidence that would be introduced to the jury, both mitigating and aggravating).

[62] Neither Kohanski nor Maish had any additional contact with Wilson following the trial. (Docs. 16-6 at 89; 16-10 at 83, 93). They based their opinions in large part on the clinical findings of Herrera. (Docs. 16-6 at 85; 12-10 at 18, 20).

used norms of his own making, which he based on "hundreds of articles." (Doc. 16-2 at 31-33, 35).

Herrera's finding that Wilson's alleged ADHD continued into adulthood was questionable. He discounted the neurological tests that revealed no impairment in attention and concentration because, in his opinion, Wilson does not suffer from attention problems. (Doc. 16-2 at 72-73). Rather, he suffers from an inability to regulate impulsivity and hyperactivity. (Doc. 16-2 at 72-73). According to Herrera, adults with ADHD "have often been shown to have a frontal lobe defect that significantly limits their ability to learn from experience, to engage sound judgment, to utilize abstract reasoning skills and to control impulsive behavior." (Doc. 12-9 at 99). Yet, he admitted the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") criteria for ADHD does not mention frontal lobe defects. (Doc. 16-2 at 71).

Also problematic was the absence of neurological imaging. As discussed, Kohanski initially told trial counsel Wilson needed to undergo neurological imaging (MRIs or CT scans), a physical evaluation, and psychological testing in order to verify the brain damage and ADHD she suspected. (Docs. 12-9 at 59; 16-6 at 83). Maish testified he always requested neurological imaging when neuropsychological tests indicated a patient may have brain damage. (Doc. 16-10 at 96). However, Herrera recommended against any neurological imaging, and no physical examination was performed. (Docs. 16-2 at 59-60, 90; 16-6 at 85). Even without these, and without examining Wilson again,

Kohanski agreed with Herrera that Wilson has ADHD and frontal lobe brain damage. (Doc. 12-9 at 60).

Further, some of Herrera's findings hurt more than helped. The Minnesota Multiphasic Personality Inventory 2 ("MMPI-2") administered by Herrera indicated individuals such as Wilson "typically receive a psychotic diagnosis" and that Wilson projects blame onto others and uses denial as a defense mechanism. (Doc. 16-2 at 62, 81-82). This finding would have bolstered the State's argument that Wilson was seeking to avoid punishment by projecting blame for the murder onto Butts, just as Wilson had denied responsibility and tried to blame others for many of his previous crimes.

Herrera agreed Wilson's MMPI-2 results matched the MMPI profile results administered by the Georgia Regional Hospital in January 1992:

> Most adolescents with this profile are hostile, sullen, resentful, irritable, and angry. . . . They can be notably argumentative, self-centered, obnoxious, irresponsible, rebellious, adventurous and unreliable. . . .
>
> The potential for occasional acting-out and antisocial behavior and conflicts with authority figures is a likely possibility. This is further reinforced by his reported history. He tends to disregard the consequences of his actions and may not profit from experience.

> Projection and denial are prominent defense mechanisms. Control over impulses seems inadequate. On the whole his judgment tends to be poor.

(Docs. 16-2 at 64-65; 13-14 at 10). Herrera acknowledged the psychologist at Georgia Regional Hospital was concerned that "[d]iagnostically [Wilson] is felt to be showing the picture of a Conduct Disorder," which is the juvenile precursor to antisocial personality disorder. (Docs. 16-2 at 66-68; 13-14 at 10).[63] Herrera confirmed that Wilson did, in fact, meet some of the criteria for a conduct disorder. (Doc 14-1 at 4). Thus, much of Wilson's mental health evidence could be characterized as a "double-edged sword," with some of the evidence being more harmful than mitigating. *Evans*, 703 F.3d at 1328-29 (cataloging cases in which the Eleventh Circuit has held evidence of antisocial personality disorder, psychopathy, substance abuse, and brain damage can often hurt the defense more than it helps).

Wilson, citing *Porter*, claims the state habeas court unreasonably discounted the effect his mental health experts' testimony would have had on the jury. (Doc. 47 at 35). *Porter* is distinguishable. Both Porters postconviction counsel and the State presented psychological testimony at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d 917, 922 (Fla. 2001). The

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[63] According to records from Wilson's September 1997 stay at Central Georgia Hospital, Wilson was diagnosed with antisocial personality disorder as an adult. (Doc. 14-1 at 4). Herrera did not mention this diagnosis.

postconviction court flatly rejected the testimony of Porter's expert and accepted the testimony from the State's psychologist. *Id.* at 923. On appeal, the Florida Supreme Court accepted that finding. Thus, the Florida Supreme Court failed to give any consideration at all to Porter's mental health evidence for the purpose of nonstatutory mitigation. *Porter*, 558 U.S. at 42-43. The Supreme Court held that it was unreasonable for the state court to "discount entirely the effect that [the expert's] testimony might have had on a jury" simply because there were "problems with the tests used . . . and the conclusions" drawn. *Id.* at 43. In Wilson's case, nothing in the state habeas court's opinion indicates it failed to consider or "discount[ed] entirely the effect that" Wilson's evidence of ADHD and frontal lobe brain impairment would have had on the jury. Instead, the court simply determined that even if his sentencing jury had heard the mental health evidence, there is no reasonable probability they would have given Wilson a different sentence. (Doc. 18-4 at 26). This was not an unreasonable application of *Strickland.*

On the ultimate question of whether Wilson had been prejudiced by trial counsel's investigation and presentation of mitigation evidence, the state habeas court concluded:

> With regard to the affidavit and witness evidence Petitioner presented to this Court as additional potential mitigating evidence, this Court finds that, even if the evidence had been admissible at trial, there is no reasonable probability that the outcome of the trial

would have been different given: (1) the limited nature of the additional, admissible, non-cumulative portions of Petitioner's potentially mitigating testimony; (2) the overwhelming evidence of Petitioner's guilt,[64] including: his statements to law enforcement officers; evidence that Petitioner and Co-Defendant Butts had taken the victim's car after shooting the victim and stopped to purchase gasoline, where Petitioner was observed by witnesses and videotaped by a security camera inside the service station; evidence that Petitioner and Co-Defendant Butts then drove to Atlanta where they contacted Petitioner's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile; evidence that Petitioner and Co-Defendant Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire; and evidence that a sawed-off shotgun was found at Petitioner's residence that was loaded with the type of ammunition used to kill the victim; and (3) the evidence in aggravation that was presented to the jury including: testimony that Petitioner had robbed and shot

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[64] Wilson alleges the state habeas court appears to have conflated the two phases of trial when it stated that in light of "the overwhelming evidence of Petitioner's guilt," there was no reasonable probability the outcome of the trial would have been different. (Doc. 43 at 109). However, the jury was specifically instructed "to consider all the evidence received here in court in both stages of this proceeding" when arriving at their verdict as to sentencing. (Doc. 10-6 at 44). Thus, the jurors could consider the evidence of Wilson's guilt during their sentencing deliberations.

> Jose Valle in 1991, because Petitioner wanted to know what it felt like to shoot somebody; testimony that Petitioner had previously shot Robert Underwood in 1993; testimony regarding Petitioner's arrest for possession of drugs; testimony that Petitioner had previously shot a neighbor's dog for no reason; evidence regarding Petitioner's juvenile convictions for arson and criminal trespass; evidence of Petitioner making a death threat; and evidence of Petitioner fighting in school and assaulting a correction officer at the Regional Youth Development Center.

(Doc. 18-4 at 31-32) (record citations omitted).

For the reasons discussed in detail above, the Court cannot find the state habeas court's prejudice determination was based on unreasonable findings of fact or that it constitutes an unreasonable application of *Strickland*. Thus, even if trial counsel were deficient in their development of mitigation evidence, Wilson has not established that he was prejudiced.

d. Trial counsel's allegedly ineffective assistance regarding gang related testimony from Chief Deputy Howard Sills and Deputy Ricky Horn

Wilson claims trial counsel were deficient because they failed "to protect Mr. Wilson from irrelevant, unreliable, false, and misleading evidence regarding gangs." (Doc. 43 at 4) (capitalization removed). The

evidence Wilson attacks is the sentencing phase testimony of Chief Deputy Sills and Deputy Horn. Wilson claims his lawyers in the state habeas action, armed with nothing more than "basic cross-examination skills and the Baldwin County Sheriff Department's own documents," showed that Sills's and Horn's gang testimony was based on "pure speculation, conjecture, and unverifiable hearsay, and in every instance were misleading exaggerations at best." (Doc. 43 at 130-31).

At the outset, the Court notes that Wilson does not claim trial counsel were deficient for allowing the admission of Wilson's gang reference-laden confession and notebooks.[65] Putting aside Sills's and Horn's testimony, the jury still heard Wilson boast that he joined the FOLKS gang while he was incarcerated and that by "fighting and stuff like that," he rose to the rank of "God damn chief enforcer." (Doc. 10-4 at 77-78). The jury heard Wilson confess that he had advanced as high as he could in the gang hierarchy and that he could have as many gang members under him as he wanted. (Doc. 10-4 at 77). In his notebooks, the jury read that FOLKS gangsters should "kill anybody [they] feel has disrespected [them] or threatened [them] in any way" and should kill, or be killed, for their fellow gangsters. (Doc. 10-8 at 27-28). Further, the Respondent introduced at the state habeas hearing

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[65] At times in their brief, Wilson's lawyers suggest effective counsel could have precluded the admission of gang evidence, but they never argue that Wilson's own statements about FOLKS were not admissible.

letters written by Wilson that were even more explicit in their discussion of gang evidence.[66]

Given the evidence from Wilson's own hand and mouth, his lawyers put their credibility in jeopardy when they attack Sills's and Horn's testimony by arguing that "there is no remotely credible or reliable evidence that the FOLKS gang in Baldwin County was violent." (Doc. 47 at 47). Considering Wilson's confession, his notebooks and letters, his extensive criminal history, and the brutality of Parks's murder, the state habeas court reasonably concluded that Wilson was not prejudiced by trial counsel's failure to exclude, limit, or rebut Sills's and Horn's testimony.[67] This is

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[66] In these letters, Wilson instructed fellow gang members that "it's all about that Money, Mackin, Murder, and that should be our main priority; We should be making more money, macking more ho's to make more G Queens, and murdering all that oppose our nation, but only when necessary." (Doc. 15-14 at 33). He explained that he had "big plans" to help the gang "rise up" and carry on "organized crime" to make "legit money, as well as illegal money." (Doc. 15-14 at 32-33, 38). He bragged that he was "talking about straight keys (cocaine) and G's (grands) big money." (Doc. 15-14 at 38). Referencing violence among various gangs, Wilson wrote,

> I know that you heard about that shoot-out with the South Side and them Boddie project niggas. I guess you know that Manice and Jermaine Reanes got shot. I'm telling you folk, when I get out it ain't go be none of that hoe shit, them niggas will die before they try the Manor, Folks, and the whole South Side again.

(Doc. 15-14 at 32).

[67] Wilson argues that *Alexander v. State*, 270 Ga. 346, 509 S.E.2d 56 (1998), which features the same prosecutor, trial judge, and gang, is "direct evidence of *Strickland* prejudice in that it

represents a finding by the Georgia Supreme Court that such evidence is exceptionally prejudicial." (Doc. 47 at 54) (emphasis omitted). The Court does not doubt that such evidence can be prejudicial. However, in Wilson's particular case, he has not shown *Strickland* prejudice – he has not shown that there was a reasonable probability that, absent trial counsel's alleged errors, "the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Rose v. McNeil*, 634 F.3d 1224, 1242 (11th Cir 2011) (internal quotation marks and citation omitted). More importantly, he certainly has not shown what is required under AEDPA – that the state habeas court's lack of prejudice determination was unreasonable. Furthermore, except for the fact that it involved the same judge and prosecutor, *Alexander* bears little similarity to Wilson's case. In *Alexander*, the prosecutor informed the jury in his guilt/innocence opening statement that he would show the defendant, a FOLKS gang member, was in an argument with a Blood gang member at a "Stop the Violence" rally, and, in retaliation for the argument, committed a drive-by shooting to terrorize a neighborhood of the Blood gang. *Id.* at 348-49, 509 S.E.2d at 59. However, the prosecutor failed to offer any evidence that Alexander was a member of FOLKS, that the person with whom he argued was in the Blood gang, or that the area of the drive-by shooting was a Blood neighborhood. He provided no "evidence of the significant connection to gangs that he detailed in his opening statement" and he offered no explanation regarding why he failed to do so. *Id.* at 349, 509 S.E.2d at 59-60. The trial court gave a general instruction that opening statements are not evidence but failed to specifically instruct the jury not to consider the prosecutor's opening statement. The Georgia Supreme Court found that the prosecutor's opening statement was in bad faith, was prejudicial, and the trial court's general instruction did not render the statement harmless. *Id.* at 350-51, 509 S.E.2d at 60-61. In *Wilson's* case, opening statements are not at issue, evidence undeniably established that Wilson was the chief enforcer of the local FOLKS gang, and evidence from Sills, Horn, and Wilson himself established the violent nature of the gang. Such evidence was relevant to issues to be decided during Wilson's sentencing.

likely more than sufficient to address Wilson's complaints about that testimony, but the Court will address them nonetheless.

Wilson argues that *Dawson v. Delaware*, 503 U.S. 159 (1992), and "a plethora of Georgia case law" could have been used by trial counsel to prevent Sills and Horn from testifying. (Doc. 43 at 133-144). Both contentions are without merit.

i) The relevancy of gang evidence

In *Dawson*, the Supreme Court held that the introduction of evidence of a defendant's abstract beliefs during a sentencing hearing can violate the defendant's First Amendment rights when the evidence has no relevance to legitimate issues. 503 U.S. at 167. But the Court made clear that if the evidence is relevant, for example to prove an aggravating circumstance, then the Constitution does not bar admission of the evidence. *Id.* at 166. For this reason, the Georgia Supreme Court, in Wilson's direct appeal, rejected the argument that the introduction of gang evidence violated Wilson's First Amendment rights. Acknowledging *Dawson*, the Georgia Supreme Court held that evidence of Wilson's FOLKS membership and the gang's violent nature were relevant to issues in the sentencing phase of his trial. *Wilson*, 271 Ga. at 813-14, 525 S.E.2d at 344. Based on this holding, the state habeas court found that trial counsel were not deficient for failing to raise a *Dawson* objection and, in any

event, Wilson could not establish he was prejudiced by their failure. (Doc. 18-4 at 30-31).

In his brief, Wilson's attack on this conclusion by the state habeas court is a little difficult to follow. (Doc. 143 at 192-93). Wilson acknowledges that the Georgia Supreme Court found gang evidence relevant to issues in the sentencing phase, but claims the court "in the end declined to rule on the *Dawson* claim because counsel failed to object to the evidence at trial." (Doc. 43 at 192). Wilson misreads the Georgia Supreme Court's opinion; the court clearly ruled gang evidence was relevant to a legitimate issue. But Wilson does not seem to challenge this relevancy determination. Rather, he argues the Georgia Supreme Court's *Dawson* ruling "does not foreclose in any way a showing that due to counsel's ineffectiveness, the inaccuracy and unreliability of the gang testimony was not revealed to the trial court, jury or to this Court." (Doc. 43 at 192) Thus, Wilson does not question the relevancy of gang evidence generally but rather the evidentiary sufficiency of Sills's and Horn's testimony. He can make this argument, and does make this argument, but that does not call into question the finding that trial counsel were not deficient for failing to challenge the general relevancy of gang evidence on constitutional grounds. In short, Wilson has not established that the state habeas court unreasonably applied *Strickland* when it rejected his claim that trial counsel were deficient for failing to raise a *Dawson* objection to the relevancy of gang evidence generally.

ii) Evidentiary sufficiency of Sills's and Horn's testimony

Wilson contends that effective trial counsel would have used a "plethora of case law" to exclude, limit, or rebut Sills's and Horn's testimony because: (a) Horn was not qualified to testify as an expert; (b) much of Horn's testimony was based on hearsay; (c) Sills, who did not testify as an expert, gave hearsay testimony, most notably in his account of the murder of a Fayette County, Georgia sixteen-year-old girl by a gang member seeking to elevate his status; (d) both Sills and Horn improperly testified that Wilson was a leader of the FOLKS gang in Baldwin County; and (e) both Sills and Horn improperly testified about the number of FOLKS gang members in Baldwin County and various FOLKS practices, such as committing crimes to elevate status.[68] These arguments require only brief discussion.

a) Horn's expert qualifications

Horn, who had 20 years of law enforcement experience, testified that he had been investigating gangs in Baldwin County for seven years. (Doc. 12-5 at 67,

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[68] Wilson also complains about Horn's testimony that FOLKS stands for Followers of Lord King Satan. (Doc. 10-4 at 114). The state habeas court reasonably found that Wilson did not establish that Horn's testimony was inaccurate. Horn testified that he garnered this information from gang members and from seminars. (Docs. 12-5 at 47, 75-76; 15-14 at 13). While Wilson's expert testified that he had never heard this interpretation of FOLKS, this Court cannot say that the state habeas court's finding was incorrect, much less unreasonable.

69). He attended the Southeastern Gang Conference sponsored by the Law Enforcement Coordinating Committee of the United States Attorney and other seminars. (Doc. 13-9 at 26). He acknowledged, however, there was little formal education regarding gangs available to law enforcement officers at the time. (Doc. 12-5 at 71). He had not reviewed "academic works" because his approach "to gangs was from a law enforcement aspect." (Doc. 12-5 at 39-40). Rather, he conducted his own investigations by speaking with gang members, parents of gang members, and other law enforcement officers. He read law enforcement publications and followed media articles and programs. (Doc. 12-5 at 38-39). In short, his claimed expertise was based primarily on his experience. The state habeas court, agreeing with the Georgia Supreme Court, found that Horn "easily qualified as an expert on Baldwin County gangs."[69] (Doc. 18-4 at 33).

Georgia courts, like federal courts, permit law enforcement officers with sufficient experience to testify as gang experts. *Burgess v. State*, 292 Ga. 821, 822, 742 S.E.2d 464, 466 (2013) (citing *Thomas v. State*, 290 Ga.

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[69] The state habeas court was referring to the Georgia Supreme Court's finding in Wilson's codefendant's appeal that Horn could have qualified as an expert: "Butts argues that an investigator gave testimony during the sentencing phase of Butts's trial about gangs that would have been improperly perceived by the jury as being expert testimony. This issue is waived because Butts raised no objection at trial. Furthermore, we find nothing improper in the testimony, as it appears from the transcript that the witness would have qualified easily as an expert on gangs." *Butts*, 273 Ga. at 769, 546 S.E.2d at 483.

653, 658, 723 S.E.2d 885, 890 (2012)); *see also Williams v. State*, 279 Ga. 731, 732, 620 S.E.2d 816, 818 (2005) (special knowledge in a field may be derived from experience as well as study, and formal education is not a prerequisite); *see United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011).

But Wilson claims the state habeas court found Horn to be an expert solely because of the Georgia Supreme Court's decision in his codefendant's case. According to Wilson, "by making this conclusory finding the basis of the rejection of the ineffectiveness claims," the state habeas court failed to consider the jury impact that testimony such as that presented at the state habeas evidentiary hearing would have had. (Doc. 43 at 174). The state habeas court did not base its finding solely on the Georgia Supreme Court's decision in *Butts*. Rather, it examined Horn's trial and state habeas testimony regarding his experience. (Doc. 18-4 at 33-34). There is no indication the state habeas court failed to consider the impact that cross examination of Horn, such as that done at the state habeas hearing, would have had. By finding Wilson had not established prejudice as to trial counsel's questioning of Horn's experience, the state habeas court necessarily determined that further cross-examination of Horn would not have, in reasonable probability, changed the outcome of Wilson's sentencing.[70]

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[70] Wilson also argues that the state habeas court's finding that Horn was an expert was unreasonable because Horn admitted he was not that knowledgeable about the FOLKS gang. (Doc. 43 at 152). Horn's statement that he was not that knowledgeable

The state habeas court's finding that Horn was an expert on gangs in Baldwin County was not unreasonable, and the court's determinations that trial counsel were not deficient and Wilson was not prejudiced when they failed to object to Horn's qualifications did not involve an unreasonable application of *Strickland.*

b) Horn's hearsay testimony

Because Horn was an expert, he could properly rely on hearsay in reaching his opinions. It is true, as Wilson argues, that an expert cannot "'give an opinion based [entirely] upon reports which have been prepared by others and which are not in evidence." *Leonard v. State*, 269 Ga. 867, 871, 506 S.E.2d 853, 857 (1998) (quoting *Loper v. Drury*, 211 Ga. App. 478, 481, 440 S.E.2d 32, 35 (1995)). Nor may an expert merely repeat the opinions of others. *Moore v. State*, 221 Ga. 636, 643, 146 S.E.2d 895, 901 (1966); *Brown v. State*, 206 Ga. App. 800, 801-02, 427 S.E.2d 9, 10 (1992); *Jordan v. Georgia Power* Co., 219 Ga. App. 690, 693, 466 S.E.2d 601, 605 (1995). It is also true that Georgia courts have struggled with defining the extent to which experts may rely on experts. But while an expert may not simply parrot the opinions of others, he can

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about FOLKS was in response to a question regarding whether Wilson was a member of the Black Gangster Disciples subsection or the Insane Gangster Disciples subsection. (Doc. 12-5 at 64-65). Horn stated that, "[t]he difference between a Black Gangster Disciple and an Insane Gangster Disciple, I am not that knowledgeable." (Doc. 12-5 at 65). This lack of knowledge regarding subsections of the FOLKS gangs would not prevent him from being considered an expert on local Baldwin County gangs.

rely on hearsay, including the reports of others, in reaching his conclusions. *Fulmore v. CSX Transp., Inc.*, 252 Ga. App. 884, 557 S.E.2d 64 (2001), rev'd on other grounds, *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

Thus, Horn's testimony regarding the Baldwin County FOLKS gang's history, origin, behavior, ties to other cities, number of members, behavior, and presence in prisons, schools, or the YDCs was not inadmissible simply because it was based on hearsay. Based on his experience and expertise, Horn could rely on information gathered during his investigations to reach his conclusions. (Doc. 12-5 at 37-39). Thus, the state habeas court's determinations that trial counsel were not deficient for failing to challenge his testimony as hearsay and that Wilson was not prejudiced were reasonable.

c) Sills's inappropriate testimony

Sills is another matter. He was not qualified as an expert on gangs. Yet he testified about some matters as to which he had no personal knowledge. Most notably, he said a Fayette County law enforcement officer told him that a gang member killed a sixteen year old girl in order to elevate his status in a gang. (Docs. 10-4 at 101-02; 43 at 171-72)[71]

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[71] The balance of Sills' hearsay testimony was cumulative of Horn's testimony. The state habeas court found that "trial counsel were not deficient or Petitioner prejudiced by trial counsel not objecting to the small portion of Sheriff Sills'[s] testimony that

The state habeas court found that Wilson "failed to establish deficiency or prejudice as Petitioner was not tied to [this] incident by the testimony of Sheriff Sills or Ricky Horn at Petitioner's trial." (Doc. 18-4 at 36). Wilson states that this was "an unreasonable fact determination." (Doc. 43 at 171). Given the deference this Court must accord factual findings made by state courts, the Court finds the state habeas court's finding of no prejudice was reasonable. No testimony connected Wilson to the Fayette County murder. According to Sills, this murder occurred before 1992 or 1993. (Doc. 10-4 at 99, 101). The jury knew that Wilson lived in Glynn and McIntosh Counties at that time. There was no evidence he was then a FOLKS member (although there was considerable evidence of his violent criminal activities).[72] There is no reason to believe

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Petitioner argues was inadmissible as it was merely cumulative of Ricky Horres admissible testimony." (Doc. 18-4 at 34) (record citations omitted). Wilson maintains "[t]o find that Sills's testimony was not prejudicial because it was cumulative of Det. Horn's testimony is directly contradicted by the record and therefore constitutes an unreasonable finding of fact." (Doc. 43 at 174). This argument is without merit. The record reveals that, with the exception of Sills's testimony about the Fayette County murder, the sentencing jury heard all of the testimony about which Wilson complains from both Sills and Horn. (Doc. 10-4 at 114, 122-23).

[72] Previous witnesses had already told the jury that during this time period, Wilson lived in Glynn and McIntosh Counties where he was busy shooting Valle, shooting a small dog, attacking a youth development worker, assaulting a classmate, selling crack cocaine, and, finally, shooting Underwood, for which he was incarcerated from July 29, 1993 until 1995. (Docs. 8-7 at 46; 10-2 at 24-26, 46-48, 62-66, 90-93; 10-3 at 37-39, 46-47; 10-5 at 135-36; 10-6 at 8-9).

the jury thought Wilson had any connection to a murder in Fayette County during this time.[73] Even if the Court determined that the state habeas court's performance determination was unreasonable, there is no reasonable probability that had trial counsel objected and successfully excluded Sills's hearsay testimony, the result of Wilson's sentencing proceedings would have been different.

d) Wilson's leadership role in FOLKS

Both Sills and Horn testified that Wilson was reportedly the leader of FOLKS in Baldwin County. (Doc. 10-4 at 100, 123). Wilson claims trial counsel could have used his profile from the Baldwin County Sheriff's Office to discredit this testimony. (Doc. 43 at 153-54). The state habeas court found:

> At trial, Sheriff Sills and Detective Horn testified that Petitioner was reportedly the leader of the FOLKS Gang in Baldwin County, which they learned from collective law enforcement in the community and informants. Detective Horn also testified that there were other sets of FOLKS in Baldwin County under a different leader. Further, the record before this Court establishes that in an April 15,

[73] For the same reason, the state habeas court did not unreasonably reject the claim that Sills's testimony about a gang assault on a jogger in Baldwin County in 1992 or 1993 suggested that Wilson was involved in that incident. (Docs. 10-4 at 99, 101; 18-4 at 36).

> 1996 statement to his defense team, Petitioner stated that he was a "G," the "leader of a set" and the "highest ranking 'G' in Milledgeville." Petitioner also stated in his statement to law enforcement that he was as high as he could be and could not get any higher within the gang, and most damaging to his own case is Petitioner's emphatic declaration to law enforcement that he was the "Goddamn chief enforcer" of the FOLKS Gang in Baldwin County. Further, during the course of the defense investigation, the defense team learned that Petitioner was the highest ranking "G" in the FOLKS Gang in Milledgeville. This Court finds that counsel were not deficient and Petitioner was not prejudiced by trial counsel not attempting to discredit Ricky Horn's testimony that Petitioner was a leader of the FOLKS Gang in Baldwin County as Petitioner failed to establish that Detective Horn's testimony was inaccurate and/or misleading in any manner.

(Doc. 18-4 at 35) (record citations omitted).

Wilson's Baldwin County Sheriff's Department's profile stated he headed the "Black Gangster Disciples" in Baldwin County. (Docs. 16-5 at 50-52; 16-6 at 9; 43 at 153). The Black Gangster Disciples was a subsection of FOLKS. (Doc. 16-5 at 51).

At the state habeas hearing, Horn testified he had simply failed to update Wilson's profile with information that Wilson "was the leader of the Folk." (Doc.

16-5 at 52-53). Moreover, Wilson's profile was not necessarily inconsistent with Horn's and Sills's testimony at the sentencing hearing. Both testified that there were, or had been, more than one "set" of FOLKS in Baldwin County and someone else was the leader of the other set. (Doc. 10-4 at 109; 126). Also, Wilson admitted he had a significant leadership role in FOLKS. Looking at the entire record, and giving the state habeas court's decision "the benefit of the doubt," the Court cannot find that the state habeas court's determination regarding the accuracy of Horn's testimony was unreasonable. *Holsey*, 694 F.3d at 1260. Clearly, this Court cannot say Wilson was prejudiced by the testimony.

e) Attributes of FOLKS

Horn testified that there were between 100 to 300 members in the local FOLKS gang, but it was "hard to put a concrete figure on it." (Doc. 10-4 at 114, 124). Wilson alleges that according to the Baldwin County Sheriff's Office roster of gang members in the Milledgeville area as of November 1996, the actual number was 80. (Docs. 16-6 at 10; 43 at 154, 178). Wilson claims trial counsel were ineffective when they failed to use the roster to cross examine Horn. According to Wilson, a meaningful challenge to his testimony regarding the number of gang members could have persuaded the jury his testimony was inaccurate and pure speculation.

The state habeas court rejected this claim.

> As to the accuracy of Detective Horn's testimony concerning how many individuals were in the FOLKS Gang in Baldwin County, this Court finds that Petitioner failed to show deficiency or prejudice, as Detective Horn repeatedly testified before both the trial court and this Court, that the Sheriff's Department's system identified suspected gang members, but did not identify all the gang members in the area. He further testified that he and others in law enforcement still thought 300 was a conservative number.

(Doc. 18-4 at 35-36) (record citations omitted).

These were reasonable findings. At the state habeas evidentiary hearing, Horn testified that the computer roster would not identify every local FOLKS gang member. (Doc. 12-5 at 41). He explained there was no way to know the exact number of gang members and "for every one you know about, there are several you don't." (Doc. 12-5 at 42-43). Wilson's expert acknowledged that it is difficult to estimate the number of members in a gang. (Docs. 12-5 at 134, 138; 12-6 at 38). The state habeas court's application of *Strickland* and its determination of the facts regarding this issue were reasonable.

Sills testified that FOLKS caused problems with "violent crimes, drive by shootings, or just crime in general." (Doc. 10-4 at 103). Horn said that gang members committed every type of crime imaginable, "from

simple battery to armed robbery, murder, [and] kidnapping. . . . Sometimes as individuals; sometimes in furtherance of the gang itself." (Doc. 10-4 at 121). He stated that he suspected there were "hundreds, probably thousands of crimes committed in Baldwin County over the last seven or eight years by gang members in furtherance of the gang. To be able to prove that in court may be another story." (Doc 10-4 at 142).

At the state habeas evidentiary hearing, Horn admitted he could not identify a single instance in which a battery, aggravated assault, murder, or kidnapping had been done to further of FOLKS interests. He maintained, however, that his testimony was not an exaggeration, just "rhetorical." (Doc. 12-5 at 58).

Wilson understandably argues this testimony was based on nothing but speculation and conjecture. (Doc. 43 at 183). The bases for the testimony about gang crimes generally appears [sic] thin, but, for reasons already discussed, the Court cannot find that the state habeas court's determination of no prejudice was unreasonable. Even if trial counsel had managed to exclude or discredit this testimony, the jury would still have learned of Wilson's lengthy criminal history, his own gang activities, and FOLKS's advocacy of violent crime. Given the State's evidence in aggravation, the state habeas court reasonably found there was no reasonable probability that, but for trial counsel's failure to keep this testimony out or discredit it, the result of Wilson's sentencing would have been different.

Both Sills and Horn testified that FOLKS members committed crimes to elevate their status in the gang. (Doc. 10-4 at 101-02, 122-23, 126). The state habeas court found that trial counsel were not deficient and Wilson was not prejudiced because he "not only failed to show that this testimony was inaccurate, but [Wilson], in his post-arrest statement, conceded this point as did Dr. Hagedorn." (Doc. 18-4 at 36) (record citations omitted).[74]

Wilson asserts the state habeas court's findings were unreasonable. First, he argues that his statement does not support the notion that gang members commit crimes to elevate their status. (Doc. 43 at 187). This is not true. Wilson stated that the commission of a crime "would give [a gang member] some more range if that's what his G want [sic] to do for him." (Doc. 10-4 at 76). Hagedorn conceded that Wilson's statement was accurate – If "your G, if the leader asks you to do something and is going to reward you for it, then you do it." (Doc. 12-6 at 40). This is just what Horn and Sills told the jury. Echoing Wilson, Sills stated that a gang member can obtain a higher rank in the gang by committing crimes, but it is up to his "G, meaning his gangster." (Doc. 10-4 at 102). Horn explained that gang members increase their rank by committing crimes, but they are forbidden from committing crimes "without the permission of [their] G, [their] boss." (Doc. 10-4 at 122-23). Accordingly, the state habeas court's decision was not based on unreasonable factual findings

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[74] Dr. John Martin Hagedorn was Wilson's gang expert at the state habeas hearing.

and did not involve an unreasonable application of *Strickland*.

e. Trial counsel's failure to hire a gang expert

Wilson maintains that trial counsel were ineffective for failing to retain a gang expert. The state habeas court found:

> Petitioner has failed to establish that trial counsel's decision to rely on their psychiatrist, Dr. Renee Kohanski, to rebut the State's gang evidence was deficient or that Petitioner was prejudiced by trial counsel not hiring a gang expert to testify at trial. Mr. Carr testified that they did not consider getting their own gang expert, but chose to have Dr. Kohanski testify that the gang was the only family structure Petitioner had and why this was his family structure based on his background. He further testified that he did not feel there was anything to gain by hiring a gang expert other than Dr. Kohanski. In fact a review and comparison of the testimony of Petitioner's newly hired gang expert with the testimony presented at trial shows that trial counsel were not deficient or Petitioner prejudiced by trial counsel making the strategic decision not to hire a gang expert, but to rely on Dr. Kohanski, as Dr. Hagedorn's testimony was, in large part, cumulative of the testimony of Dr. Kohanski and the State's Witness, Ricky Horn. This Court finds that the limited additional testimony that Petitioner presented to this

> Court would not have, in any reasonable probability, changed the outcome of Petitioner's trial.
>
> Also supporting the denial of Petitioner's ineffective assistance claim with regard to hiring a gang expert is the fact that Dr. Hagedorn only spoke to Petitioner once over the telephone, conceded he could not testify "with any certainly about the gang situation in Milledgeville," that he had not "done the research here," did not contest that Petitioner said he was the chief enforcer of the gang, and, although testifying that "chief enforcer" is not a particularly high rank, he conceded that a term in Chicago could "likely" mean something different in Milledgeville.
>
> This Court finds that trial counsel were not deficient nor Petitioner prejudiced by trial counsel making a reasonable strategic decision not to hire a defense expert on gangs in addition to the testimony offered by Dr. Kohanski.

(Doc. 18-4 at 37-38).

Citing *Wiggins*, 539 U.S. 510 (2003), Wilson argues that the state habeas "court's non-deficient performance finding unreasonably applies *Strickland* in that the trial attorneys had access to separate court funds to retain [a gang expert] yet failed to consult with any, rendering their decision uninformed and therefore nonstrategic." (Doc. 43 at 195). But *Wiggins* did not hold that trial counsel are *per se* ineffective if they fail

to hire an expert when funds are available.[75] The standard practice in capital litigation at the time of Wiggins's trial was to prepare a social history report and the public defenders office made funds available for trial counsel to hire a forensic social worker for this purpose. *Id.* at 524. Despite numerous "red flags" of abuse and neglect in Wiggins's records, trial counsel chose not to retain a social worker to prepare a social history report. *Id.* at 523-24. The Supreme Court held that trial counsel's performance was deficient because their decision to cease investigating when they did was unreasonable.

Retaining a gang expert, as opposed to using a forensic social worker to develop a social history report, is not standard practice. Trial counsel testified that they knew what Horn would say about gangs, that he had been saying the same thing for years, and they thought "that it wouldn't come across that well" with the jury. (Doc. 12-8 at 109). Consistent with their mitigation theory, trial counsel hired Kohanski to testify that Wilson joined a gang because it provided him the family, guidance, and structure he never had. Given this record and the required AEDPA deference, the

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[75] Wilson's assertion that the trial court offered funds so that trial counsel could hire a "gang expert (a sociologist specializing in gangs)" is not entirely accurate. (Doc. 43 at 195). Trial counsel requested funds to retain a sociologist to investigate Wilson's "checkered past," not a "sociologist specializing in gang." (Docs. 8-1 at 39; 43 at 195). The trial court denied the funds but told them that if they were "going to have to go to trial, . . . bring this back up." (Doc. 8-11 at 9). There was never any discussion of funds for a "gang expert."

Court cannot say the state habeas court's performance determination involved an unreasonable application of *Strickland*.

Wilson argues the state habeas court's finding that "Hagedorn's testimony was cumulative of that presented by Dr. Kohanski at sentencing" was an unreasonable factual determination.[76] (Doc. 43 at 195). Wilson mischaracterizes the state habeas court's finding. It did not find Hagedorn's testimony cumulative of Kohanski's. Rather, it found "Hagedorn's testimony was, in large part, cumulative, of the testimony of Dr. Kohanski and the State's Witness, Ricky Horn." (Doc. 18-4 at 38). There is a difference between "cumulative" and "in large part cumulative." "'Cumulative' may mean 'completely cumulative' or it may not, but [in large part cumulative] does not mean 'cumulative.' Instead, [it] means 'chiefly cumulative,' mostly cumulative,' or 'more cumulative than not.'" *Holsey*, 694 F.3d at 1259. Thus, the question is whether it was reasonable for the state habeas court to find Hagedorn's testimony "in large part cumulative" of both Kohanski and Horn's testimony. (Doc. 18-4 at 38). It was.

Like Horn, Hagedorn testified: If a gang leader approves, a gang member can advance in rank by committing crimes; it is hard to determine how many

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[76] As explained previously, there is some doubt about treating a "cumulative" conclusion as factfinding to be reviewed under 28 U.S.C. § 2254(d)(2). However, Respondent does not contend the Court should not treat the state habeas court's determination as factfinding, and doing so does not affect the result reached by the Court. *See Holsey*, 694 F.3d at 1259-60.

members a gang has because gang members often do not admit membership; gang members can be violent and dangerous; small town gang activity can present serious problems; gang members commit crimes or violent acts for personal reasons at times and to help the gang at other times; and Wilson was the chief enforcer of the local FOLKS gang. (Doc.12-6 at 8, 18-19, 37-40). Like Kohanski, Hagedorn testified: The Baldwin County FOLKS gang was more of a "peer group" for Wilson; troubled youths and children from broken homes, like Wilson, are attracted to gangs because they are looking for acceptance, structure, and protection; Wilson joined a gang, in part, because he was searching for his identity; and Wilson could have had a productive life if he just had the right guidance and mentoring. (Doc. 12-6 at 9, 13-15, 51-52).

Also, the state habeas court reasonably found that the value of Hagedorn's additional, noncumulative testimony was undercut by the fact that his research was conducted in Chicago and Milwaukee, not Georgia or Baldwin County. (Docs. 12-5 at 138; 12-6 at 1, 39). He acknowledged that gangs vary from location to location, and to know how the gang operates in an area, one must conduct research by speaking with law enforcement, gang members, and local schools. (Doc. 12-6 at 42-43). His admission that he could not testify "with any certainty the gang situation in Milledgeville" certainly supports the state habeas court's finding that Wilson was not prejudiced by trial counsel's failure to hire a gang expert. (Doc. 12-6 at 26).

Citing *Porter*, Wilson argues the state habeas court failed to consider or unreasonably discounted Hagedorn's testimony. (Doc. 43 at 196). Not so. The state habeas court considered Hagedorn's testimony, found it largely cumulative of that presented at trial, and determined the "limited additional testimony that Petitioner presented to [the] Court would not have, in reasonable probability, changed the outcome of Petitioner's trial." (Doc. 18-4 at 38). This analysis did not involve an unreasonable application of *Strickland*, nor was it based on unreasonable findings of fact.

f. Ineffective assistance during the guilt/innocence phase

Wilson maintains that trial counsel performed deficiently and prejudiced him during the guilt/innocence phase of his trial by failing to offer testimony from three inmates to whom Butts confessed that he was the triggerman; by failing to prepare and present testimony from Rafael Baker, Felicia Ray, Sills, and Johnson; and by failing to object to the trial judge's decision not to accompany the jury to view the crime scene and subsequently failing to alert the trial and appellate courts that jurors violated the trial judge's order by leaving the bus and walking around the crime scene. (Doc. 43 at 198-214).

i) Failure to offer testimony from inmates

Butts allegedly told three fellow inmates, May, Garza, and Holcomb, that he shot Parks. (Doc. 12-11 at 27-28). May and Garza testified at Butts's trial that Butts confessed to being the triggerman. (Doc. 43-1 at 9-10, 20); *Butts*, 273 Ga. at 762, 546 S.E.2d at 478. Holcomb testified he could not remember what Butts told him. (Doc. 43-1 at 10 to 18).

During Wilson's trial, trial counsel attempted to call two[77] of the inmates to testify about Butts's confession. (Doc. 9-19 at 22). Trial counsel countered the State's hearsay objection by arguing Butts was a co-conspirator, thus his statement was admissible under Georgia's co-conspirator hearsay exception, O.C.G.A. § 24-3-5. (Doc. 9-19 at 22-29). The trial court ruled the co-conspirator exception did not apply because the conspiracy had ended. (Doc. 9-19 at 35). Trial counsel unsuccessfully made the same co-conspirator exception argument in their motion for new trial. (Doc. 14-13 at 55).

On appeal, the Georgia Supreme Court also rejected this argument:

> Wilson claims that self-inculpatory statements allegedly made by Robert Earl Butts to three of Butts's fellow inmates were made "during the pendency of the criminal project" (O.C.G.A. § 24-3-5) in which Wilson and Butts

[77] It is unclear which of the two inmates trial counsel wanted to present.

had been engaged as co-conspirators and, therefore, that those alleged statements should have been admitted during the guilt/innocence phase of Wilson's trial. The trial court excluded the evidence on the basis that any conspiracy between Wilson and Butts ended when Wilson gave statements to law enforcement officers revealing certain details of the crime and seeking to place blame for the murder on Butts. While we agree with the trial court that any conspiracy between Butts and Wilson ended upon Wilson's statements to authorities, we further add that the statutory exception to the hearsay rule upon which Wilson relies makes declarations of conspirators admissible only *against* other conspirators. It is the long-standing rule in this state that declarations to third persons to the effect that the declarant and not the accused was the actual perpetrator are, as a rule, inadmissible.

Furthermore, although this type of hearsay evidence is generally inadmissible, under the principles set forth by this Court in *Drane v. State*, 265 Ga. 255 (455 S.E.2d 27) (1995), and by the U.S. Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284, 302 (93 S. Ct. 1038, 35 L. Ed. 2d 297) (1973) (failure to admit evidence of another's confession offered during guilt/innocence phase of trial constituted a violation of due process right), and *Green v. Georgia*, 442 U.S. 95 (99 S. Ct. 2150, 60 L. Ed. 2d 738) (1979) (failure to admit evidence of co-indictee's confession offered at

punishment phase of trial violated due process right because testimony was highly relevant to a critical issue in punishment phase and substantial reasons existed to assume its reliability), there may be exceptional circumstances that make the hearsay evidence sufficiently reliable and necessary to require its admission. However, as stated in *Turner v. State,* 267 Ga. 149, 155 (476 S.E.2d 252) (1996), whenever defense counsel seeks to admit this type of hearsay evidence to support a claim that someone other than the defendant is responsible for the crimes being tried, counsel:

> must make a proffer in which the reliability and necessity of the hearsay evidence are thoroughly set out, and the trial court's ruling must reflect consideration of the proffered evidence and a determination that the evidence does or does not show "persuasive assurances of trustworthiness," or was made under circumstances providing considerable assurance of its reliability.

Despite being tried approximately one year after the *Turner* ruling was issued, Wilson, the hearsay proponent at trial, did not utilize the procedures set forth in *Turner* and did not obtain a ruling from the trial court evidencing its consideration of the proffered hearsay evidence under *Turner.* Accordingly, the trial court did not err in failing to address whether,

> under the standards set forth in *Green*, *Chambers*, and *Drane*, the hearsay evidence in question was sufficiently reliable, relevant, and necessary to require its admission in the guilt/innocence phase of Wilson's trial.

Wilson, 271 Ga. at 814-15, 525 S.E.2d at 344-45.

Before the state habeas court, Wilson argued that trial counsel performed deficiently because they did not know O.C.G.A. § 24-3-5 applied only to inculpatory statements made by a co-conspirator before the end of the conspiracy, and that the admission of exculpatory hearsay was governed by *Turner*. (Doc. 17-10 at 23-25 n.70). The state habeas court found:

> The Court notes that the majority of the testimony on which Petitioner relies to support his actual innocence claim before this Court was presented at Petitioner's trial. However, even after hearing this same evidence, the jury recommended a sentence of death. This Court finds that trial counsel were not deficient or Petitioner prejudiced by the counsel not submitting the additional evidence that Petitioner alleges trial counsel should have presented at the guilt phase of his trial.
>
> Specifically, with regard to the testimony of Gary Garza, Horace Mays and Shawn Holcomb, which was ruled inadmissible by the trial court, this Court finds that Petitioner failed to establish that counsel were deficient or that Petitioner was prejudiced by counsel not requesting a ruling as to the admissibility of their testimony based on *Turner v. State*,

> 267 Ga. 149, 476 S.E.2d 252 (1996). The defense team interviewed these three inmates, believed the inmate witnesses had "credibility issues" and felt the witnesses would be hard to control on the stand. This Court finds that based on these factors that trial counsel would not have been able to meet the exception circumstances of Turner required for the admission of such testimony.
>
> Further, even pretermitting the lack of deficiency, this Court finds that Petitioner failed to establish ineffective assistance of counsel as he failed to establish the requisite prejudice. The record establishes that these witnesses would have undermined Petitioner's mere presence defense as Mr. Mays would have also testified that Co-Defendant Butts had stated that Petitioner was in control of the events the night of the murder, including ordering the victim out of the car, and as Mr. Garza would have testified that Petitioner stood outside Wal-Mart to detain the victim and was the person who ordered the victim to stop the car, clearly showing Petitioner as a party to the crime. Also, the Court notes that trial counsel were able to submit this same testimony through their investigator during the sentencing phase of trial. Thus, this Court finds that counsel were not deficient or Petitioner prejudiced.

(Doc. 18-4 at 14-15) (record citations omitted).

Wilson argues that the state habeas court's findings are unreasonable. He maintains that trial counsel

were not worried about credibility or control issues with the three inmates. They just did not know Georgia law. According to Wilson, the state habeas court's finding "'resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to [trial].'" (Doc. 43 at 205) (quoting *Wiggins*, 539 U.S. 510, 526-27).

At the state habeas hearing, trial counsel testified that the inmates had control and credibility issues and thus they made the strategic choice to get Butts's confession into evidence during the sentencing phase of the trial through Thrasher. (Doc. 12-8 at 90-94). But for the guilt/innocence phase of the trial, the record clearly shows that trial counsel did not make a strategic decision to not call the inmates because of credibility and control problems. Instead, relying only on the patently inapplicable co-conspirator hearsay exception, they attempted to call two of the inmates to testify about Butts's confession. (Doc. 9-19 at 22-35). At the state habeas hearing, Carr acknowledged that neither he nor O'Donnell was aware of *Turner* and this lack of knowledge, not any concern over credibility or control, was why they did not make a *Turner* proffer. (Docs. 12-11 at 33; 12-6 at 106-09).

But even if the state habeas court's finding about trial counsel's performance was based on unreasonable

findings of fact or involved an unreasonable application of *Strickland*,[78] its finding regarding prejudice was reasonable. The jury was well aware Butts may have been the triggerman. The prosecutor told them so in his opening statement and told them again in his closing argument. (Docs. 9-14 at 36; 10-1 at 5-6, 20-26). Also, some of Mays's and Garza's testimony would have severely undermined Wilson's mere presence defense theory. Mays would have testified that Wilson ordered Parks to pull his car over and stop and that Wilson, not Butts, ordered Parks to get out of the car. (Doc. 16-11 at 115-16). Garza would have testified that Wilson waited outside Wal-Mart to detain Parks and that Wilson ordered Parks to stop the car. (Doc. 16-11 at 121).[79] Therefore, the state habeas court's finding that Wilson failed to show prejudice was reasonable.[80]

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[78] A likely conclusion given the Georgia Supreme Court's opinion of trial counsel's performance on this issue. *Wilson*, 271 Ga. at 814-15, 525 S.E.2d at 344-45.

[79] There is no indication that Holcomb would have provided any helpful testimony. He refused to testify when called to the stand in Butts's trial. (Doc. 43-1 at 11-18)

[80] The jury learned of Butts's confession to these inmates during the sentencing phase of Wilson's trial from three credible witnesses: Thrasher, Blenk, and Sills. (Docs. 10-4 at 104, 106; 10-5 at 73-78, 83-89). They still voted to impose the death penalty. This certainly does not support a finding that but for trial counsel's failure to have the inmates testify about Butts's confession during the guilt/innocence phase, there is a reasonable probability Wilson would have been found not guilty.

ii) Trial counsel's failure to call four additional witnesses

a) Rafael Baker

Wilson argues that Rafael Baker, whom Wilson and Butts visited the night of the murder, could have testified that Butts admitted he shot Parks. (Docs. 43 at 2-6; 12-11 at 19). In an affidavit tendered to the state habeas court, Baker stated that he tried, on several occasions, to tell trial counsel about Butts's confession, but they "wouldn't give [him] the time of day." (Doc. 12-11 at 19). Thus, according to Wilson, trial counsel were ineffective for failing to prepare and present Baker's testimony. (Doc. 43 at 206). The state habeas court held:

> As to Rafael Baker, trial counsel spoke to Mr. Baker prior to trial and Mr. Baker told trial counsel that neither Petitioner nor Co-Defendant Butts mentioned a murder or shooting someone on the night of the murder. Accordingly, trial counsel were not deficient for not calling Mr. Baker to testify to evidence he expressly denied to trial counsel prior to trial. As to Mr. Baker's claim that he attempted to talk to defense counsel, but they would not talk to him, Mr. Baker's testimony is belied by Mr. Carr's testimony in which Mr. Carr testified, live before this Court with undeniable certainty, that neither Mr. Baker nor anyone else approached trial counsel with information in the days leading up to the trial. Further establishing that Petitioner failed to show deficiency or any resulting prejudice

> with regard to trial counsel's decision not to attempt to elicit testimony from Mr. Baker that Co-Defendant Butts was the triggerman, is the fact that Mr. Baker's roommate, who could have been called by the State in rebuttal, had previously stated that Mr. Baker made statements to him that implicated Petitioner in the murder and as the leader of the crimes. In view of these facts and the above findings concerning Mr. Baker and as Mr. Baker's current affidavit is merely cumulative of other testimony proffered at trial, or is otherwise contradicted by trial counsel, Petitioner has failed to show that counsel were deficient or that he was prejudiced.

(Doc. 18-4 at 16) (record citations omitted).

These findings were reasonable. When questioned by police, Baker denied that Wilson or Butts told him anything about the murder. (Docs. 9-16 at 50; 12-11 at 19; 13-12 at 65-66). Notes from trial counsel's file show that Baker told them he "[d]idn't hear anybody say anything about a murder" and that neither Butts nor Wilson "mentioned a shooting or who shot whom."[81] (Doc. 14-9 at 54). In his testimony during the guilt/innocence

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[81] Wilson argues that it was unreasonable for the state habeas court to find Baker had not tried to tell trial counsel what he knew about Butts being the shooter because O'Donnell corroborated Baker's story. (Doc. 43 at 210). Actually, O'Donnell testified at the state habeas hearing that he could not remember if Baker told him Butts said he was the shooter. (Doc. 12-8 at 84). Looking at trial counsel's typed notes, it appears that Baker told them neither Wilson nor Butts mentioned the murder at all. (Doc. 14-9 at 54).

phase of Wilson's trial, Baker again denied that Wilson or Butts said they had killed anyone. (Doc. 9-16 at 49).

Given this record, the state habeas court's finding that trial counsel were not ineffective for failing to present testimony from Baker was not based on any unreasonable findings of fact and did not involve an unreasonable application of federal law.

b) Felicia Ray

Wilson argues that trial counsel were ineffective because they failed to call Felicia Ray, who would have testified that Wilson was talking to her while Butts was in Wal-Mart and Wilson "seemed very relaxed," was "not anxious or nervous about anything," and, based on the way he was moving and standing, could not have been concealing a shotgun in his clothes. (Docs. 12-11 at 13; 43 at 207). The state habeas court found:

> Trial counsel also spoke to Felecia Ray prior to trial, discussed whether to call her at trial and made a strategic decision not to utilize her testimony. Although Petitioner claims that Ms. Ray could have described Petitioner as "relaxed" while Co-Defendant Butts was inside Wal-Mart, this Court finds that counsel were not deficient in not presenting this evidence and that this evidence would not have, in reasonable probability changed the outcome of trial, particularly in light of the fact that the jury also witnessed Petitioner on videotape at the gas station immediately after

> the murder of Mr. Parks, behaving in the same "relaxed" manner.

(Doc. 18-4 at 16-17) (record citations omitted).

Wilson argues the state habeas court's factual findings were unreasonable because O'Donnell had no recollection of speaking with Ray prior to trial and gave no strategic reason for not calling her. (Doc. 43 at 210). Thus, according to Wilson, the state habeas court's factual determinations that trial counsel spoke with Ray and made a strategic decision not to call her were unreasonable. (Doc. 43 at 210). The record shows that trial counsel interviewed Ray and she signed an affidavit stating that Wilson spoke with her outside Wal-Mart for ten to fifteen minutes on the night of the murder and he was not "nervous or anxious." (Doc. 14-9 at 68). When deposed by post-conviction counsel almost five years after Wilson's trial, O'Donnell testified that there must have been a reason they did not call her to testify, but he could not specifically recall Ray or the reason she was not called. (Doc. 16-11 at 23-24). There is a strong presumption that trial counsel rendered effective assistance and where trial counsel, many years after the trial, is unable to recall why he did, or did not, take certain actions, the court presumes he exercised reasonable professional judgment. *Reaves v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 886, 900 n.9 (11th Cir. 2013) (explaining the court should not take counsel's lack of memory about what he may have been thinking at the time of retrial, which occurred many years before the post-conviction hearing, for the absence of a reasoned basis for his actions); *Harvey v.*

Warden, 629 F.3d 1228, 1245 (11th Cir. 2011) (explaining that the courts must presume counsel exercised reasonable judgment instead of giving a habeas petitioner the benefit of trial counsel's short memory). Given the record, the strong presumption that trial counsel acted reasonably, and the deference that must be given to the state habeas court, this Court finds that the state habeas court's determination that O'Donnell made the strategic decision not to call Ray was reasonable. Clearly, the state habeas court's prejudice finding was reasonable as well.

c) Angela Johnson

Wilson argues that trial counsel were ineffective for failing to call Angela Johnson to testify that she witnessed Butts giving Wilson the shotgun the day after the murder and ordering him to keep it. (Doc. 43 at 208). The state habeas court held:

> Trial counsel also spoke to Angela Johnson prior to trial, and made a reasonable strategic decision not to call her as a witness because they felt she could not help Petitioner's case, as she would have testified that Petitioner had stated that he "owned the gang" and would have undermined Petitioner's mere presence defense, she had a credibility problem, and they recognized that she would not have made a good witness since she had her own pending charges. The record establishes that although Ms. Johnson stated that Co-Defendant Butts brought the shotgun over to her home, her statement also established

> that Petitioner and Co-Defendant Butts chose Donovan Parks as their victim. Trial counsel's decision not to call Ms. Johnson as a witness in either phase of the trial was reasonable and Petitioner was not prejudiced.

(Doc. 18-4 at 17) (record citations omitted).

Wilson has presented no evidence tending to establish that these findings were unreasonable. Trial counsel spoke with Johnson on numerous occasions. (Docs. 12-6 at 79; 12-8 at 94). Johnson originally told them Butts brought the shotgun into her home, but she later changed her story and claimed the police planted the gun. (Docs. 12-6 at 79-80; 16-11 at 40). She also said Wilson told her he "owned" the local gang and he and Butts picked Parks as the victim that night because he had a "nice ride." (Doc. 16-11 at 39-40, 124). In light of this record, Petitioner has not shown that the state habeas court's factual findings were unreasonable or that its decision on this issue involved an unreasonable application of *Strickland*.

d) Chief Deputy Sills

Wilson argues that trial counsel were ineffective because they did not call Sills to testify that Butts had the gun in his jacket while they were in Wal-Mart. (Doc. 43 at 207-08). Respondent maintains that the state habeas court did not address this as a separate ineffective assistance claim, but ruled, "As to the remainder of Petitioner's ineffective assistance of counsel claims, . . . this Court finds that Petitioner has

failed to establish the requisite deficiency or prejudice with regard to any of Petitioner's ineffective assistance of counsel claims."[82] (Doc. 18-4 at 41-42).

The State presented evidence that Butts concealed the shotgun while he and Wilson were in Wal-Mart. In the opening statement, the prosecutor said, "laying all the cards on the table, in the Wal-Mart, it was [Wilson's] partner in crime, his co-defendant Butts, that you'll her [sic] evidence of that was wearing the starter jacket," in which the shotgun was concealed. (Doc. 9-14 at 38). Kenya Mosley, a witness for the State, testified that Butts was wearing a coat inside Wal-Mart, while Wilson was not. (Doc. 9-15 at 108-09). Chico Mosley, another witness for the State, testified that Butts was wearing a big starter jacket while he stood outside Wal-Mart on the night of Parks's murder. (Doc. 9-15 at 139-40; 153-54). Thus, Sills's testimony confirming that Butts concealed the shotgun in his jacket while in Wal-Mart, adds very little, if anything. The state habeas court's findings were reasonable and did not involve an unreasonable application of *Strickland*.[83]

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[82] Wilson does not maintain that the state habeas court failed to adjudicate this particular claim on the merits. Even though this is a summary rejection, it is still due deference. *Richter*, 131 S. Ct. at 784.

[83] Although he provides little detail, Wilson mentions in one paragraph of his opening brief that trial counsel were ineffective for failing to find a witness who could testify that Butts worked with and knew the victim. He alleges that trial counsel "failed to develop through pretrial investigation the factual bases for showing that only Mr. Wilson's co-defendant, Mr. Butts, had previously worked with and knew the murder victim." (Doc. 43 at

iii) Trial counsel's failure to object to the jury view of the crime scene

Wilson alleges that trial counsel should have objected when the trial judge failed to attend the jury view of the crime scene and should have notified the trial judge that the jurors got off the bus to look at the scene.

After the State called its final witness in the guilt/innocence phase of the trial, it requested that the jury view the scene where Parks's body was found. (Doc. 9-19 at 9-12). Trial counsel did not object to the viewing, but did object to the judge accompanying the jury on the bus to the scene. (Doc. 9-19 at 12). The judge instructed the jury:

> [Y]ou will be taken to the scene where the body was allegedly discovered. This is simply to enable you to better interpret and understand the evidence. It is – you are not to

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207-08). According to Wilson, this would have buttressed his "mere presence" defense by showing that Butts alone had reason to worry about being identified by the victim, thereby motivating Butts to kill Parks. Wilson, but [sic] contrast, had no connection to the victim and would not have been concerned about identification. (Doc. 43 at 208). Respondent argues, and Wilson does not contest, that the state habeas court rejected this claim in its "catch all" denial of any remaining ineffective assistance claims. (Doc. 18-4 at 41-42). This claim is completely without merit. There was testimony at Wilson's trial that Butts worked with Parks. (Doc. 9-15 at 89). Also, it is ridiculous to think that Parks would not have been able to identify Wilson because he had never worked with him. Wilson had never worked with or met Underwood, the man he shot three times in 1993, but Underwood had no problem identifying him as the shooter. (Doc. 10-1 at 106-07, 119).

> discuss this at this time among yourselves or point out things or have any comment in any way. You've all heard the street name where the scene is so you'll, I'm sure, will realize when you are there. The bus will simply pause momentarily and then the bus will return you to your quarters.

(Doc. 9-19 at 14).

Wilson, trial counsel, and the prosecutor attended the jury view. (Doc. 16-11 at 66-68, 75). At least some of the jurors got off the bus. (Docs. 16-1 at 102; 16-11 at 68). O'Donnell stated that he saw nothing irregular and observed no conduct to which he should have objected. (Doc. 16-11 at 69).

On direct appeal, appellate counsel raised the issue that the trial judge was not present when the jury viewed the crime scene. The Georgia Supreme Court held that while the trial judge should have attended the jury view, Wilson failed to demonstrate any harm and thus his absence was not reversible error. *Wilson*, 271 Ga. at 817, 525 S.E.2d at 346.

In the state habeas court, Wilson argued that trial counsel were ineffective for failing to object to the trial judge's absence from the viewing and for not objecting to the jurors getting off the bus. The state habeas court rejected this contention:

> The Court finds that Petitioner failed to establish deficiency or prejudice in counsel not objecting to the trial judge being absent from

> the jury view of the crime scene as trial counsel and the State consulted and agreed upon the procedure to be employed, trial counsel and Petitioner attended the jury view by following the bus in separate vehicles, trial counsel interviewed the jurors following the conclusion of Petitioner's trial and asked a number of them about the jury view, and there was no indications from the answers of the jurors who attended the view that anything improper occurred.

(Doc. 18-4 at 18) (record citations omitted).

These findings were reasonable and supported by the record. Wilson alleges trial counsel failed to tell the trial judge the "jury had . . . violated the court's order to stay on the bus." (Doc. 43 at 214). But the judge did not order the jury to "stay on the bus," he told them the bus would pause momentarily and they were not to point out anything or discuss anything.[84] (Doc. 9-19 at 11). He did not tell them to stay on the bus while it was paused momentarily.[85]

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[84] At least one juror explained that, "There was (sic) no instructions other than no talking. They gave the jurors the option to get out of the bus." (Doc. 14-11 at 78-79).

[85] Wilson argues that the Georgia Supreme Court unreasonably found the jurors did not leave the bus. (Doc. 43 at 212-13 n.97). However, the jurors' actions were not at issue on direct appeal. Instead, the issue there was the absence of the trial judge. The Georgia Supreme Court's decision that the absence of the trial judge was harmless did not rest on its notation that the jury did not get off the bus.

Citing *United States v. Cronic*, 466 U.S. 648 (1984), Wilson alleges trial counsel were *per se* ineffective for failing to object to the judge's absence and failing to tell the judge the jury "violated the court's order to stay on the bus." (Doc. 43 at 213-14). In *Cronic*, the Supreme Court held that a showing of prejudice is unnecessary if there are circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. No specific showing of prejudice is required in only very limited situations: When there is a complete denial of counsel at a critical stage of the trial; when counsel entirely fails to subject the State's case to meaningful adversarial testing; or when counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *Id.* at 659-60. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n.26 (citing *Strickland*, 466 U.S. at 693-96). No "circumstances of that magnitude" exist in this case. The *Strickland* prejudice standard[86]

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[86] The Court notes that Wilson cites a February 16, 2002 Affidavit of Juror Brian Spivey to support his allegation that the jury failed to heed the trial judge's instructions, exited the bus, and wandered around together pointing out various parts of the scene. (Doc. 43 at 212). Notes from trial counsel's post-trial interview with Spivey dated July 23, 1998 show that Spivey informed them as follows about the [sic] viewing the scene: "They just stood around. He thought it was useless. He doesn't remember anyone asking any questions." Trial counsel noted that Spivey "thought

governs and the state habeas court's decision did not involve an unreasonable application of *Strickland* and it was not based on any unreasonable factual findings. Thus, relief must be denied.

1. Proportionality of the Death Sentence

Wilson states he was not the person who actually shot Parks and, therefore, the imposition of the death penalty is contrary to clearly established Supreme Court precedent, namely *Enmund v. Florida*, 458 U.S. 782 (1982) and its progeny. In *Enmund*, the Supreme Court held that the death penalty may not be imposed on one who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing will take place or that lethal force will be employed." *Id.* at 797. In *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court limited *Enmund*, holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Tison*, 481 U.S. at 158. A finding of the requisite culpability may be made by a jury, the trial judge, or an appellate court. *Cabana v. Bullock*, 474 U.S. 376, 392 (1986). The factual findings as to culpability must be presumed correct under 28 U.S.C. § 2254(d) and, unless the petitioner overcomes the presumption, this Court must

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some things were irrelevant (seeing the scene. . . .)." (Doc. 14-12 at 4-5). This certainly does not support a finding of prejudice.

hold that the Eighth Amendment is not offended by the death sentence. *Id.* at 388.

In Wilson's case, it took the jury less than two hours to find him guilty of malice murder, which the trial court defined, in part, as unlawfully and intentionally killing without justification. (Doc. 10-1 at 78; 95, 97). It took the jury less than two hours to find that the murder was committed while Wilson was engaged in the commission of an armed robbery. (Doc. 10-6 at 51-53). On direct appeal, the Georgia Supreme Court reviewed the facts and determined they supported the verdict and sentence:

> Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt.

Wilson, 271 Ga. at 813, 525 S.E.2d at 343-44 (internal citations omitted).

Wilson has not presented evidence to overcome these factual findings. Contrary to Wilson's contention, neither *Atkins v. Virginia*, 536 U.S. 304 (2002), *Robert v. Simmons*, 543 U.S. 551 (2005) or *Kennedy v. Louisiana*, 554 U.S. 407 (2008) altered the holding in *Tison*. It is only when a habeas petitioner shows the state court's ruling is contrary to, or involved an unreasonable application of, the holding of a United States Supreme Court decision, that this Court may grant relief. *Newland v. Hall*, 527 F.3d 1162, 1183 (11th Cir. 2008) (quoting *Williams*, 529 U.S. at 412-13). Wilson has not made such a showing.

In denying Wilson's claim that his sentence was disproportionate, the Georgia Supreme Court held:

> We also find, considering both the crime and the defendant, that the sentence of death was neither excessive nor disproportionate to the penalties imposed in similar cases. The similar cases listed in the Appendix support the imposition of the death penalty in this case, as all are cases of intentional killing committed during the commission of an armed robbery or a motor vehicle hijacking.

Wilson, 271 Ga. at 823-24, 525 S.E.2d at 351 (internal citations omitted).

To any extent that Wilson is claiming the proportionality review conducted by the Georgia Supreme Court is constitutionally infirm in general and as applied because the court failed to consider capital cases

in which life sentences were imposed when determining the proportionality of his sentence, this Court may not conduct a case-by-case comparison of the review undertaken by the Georgia Supreme Court.[87] *Mills v. Singletary*, 161 F.3d 1273, 1282 (11th Cir. 1998) (Docs. 1 at 23-26; 43 at 215 n.99). In *Moore v. Balkcom*, 716 F.2d 1511, 1518 (11th Cir. 1983), the Eleventh Court held:

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death.

2. Actual Innocence

Wilson alleges that he is actually innocent and his execution would violate the Fifth, Eighth, and Fourteenth Amendments. (Doc. 43 at 254-64). As discussed, the Georgia Supreme Court found there was sufficient

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[87] In its answer-response to Wilson's habeas petition, Respondent maintained that this particular claim is procedurally defaulted. (Doc. 7 at 11). Petitioner argues that ineffective assistance of appellate counsel provides cause to excuse any default. This Court need not address these issues because even if the claim is not defaulted, the Court is prohibited from second-guessing the state court and conducting a proportionality review.

evidence to enable the jury to find him guilty and to find the existence of a statutory aggravating circumstance. *Wilson*, 271 Ga. at 813, 525 S.E.2d at 343. Wilson raised a claim of actual innocence before the state habeas court and that court held:

> Even if this Court were to determine that Petitioner's bare claim of actual innocence was not barred by res judicata, the claim would be noncognizable in this habeas proceeding. Petitioner's proper avenue to assert his bare allegation of actual innocence would be in the trial court by properly filing an extraordinary motion for new trial.

(Doc. 18-4 at 8).

These are reasonable findings. "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Thus, a freestanding allegation of actual innocence is not cognizable in federal habeas corpus proceedings. Claims of actual innocence must be coupled with an allegation of constitutional error. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

Wilson argues that "the majority of the Supreme Court in *Herrera* at least implicitly recognized the constitutional right of an innocent person not to be executed." (Doc. 47 at 88-89). In *Herrera*, the Court explained that "'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise

barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404. However, the Court

> assume[d], for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 417.

Wilson has not made such a showing. He has not presented any newly discovered evidence or made a "truly persuasive demonstration of actual innocence." *Id.* Moreover, there are state avenues open to process his claim of actual innocence. He can, as instructed by the state habeas court, file an extraordinary motion for new trial. O.C.G.A. § 5-5-41. Additionally, he may file a request for clemency with the Georgia State Board of Pardons and Paroles. O.C.G.A. § 42-9-20.

Wilson also claims that his actual innocence should serve as a gateway to consideration of constitutional claims procedurally defaulted in state court. "The actual innocence exception to the procedural bar

is not meant to remedy ordinary errors in criminal judgments but is narrowly reserved for only 'fundamental miscarriage[s] of justice.'" *Rozelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1011 (11th Cir. 2013) (quoting *Schlup*, 513 U.S. at 315). "In the usual case the presumed guilt of a prisoner convicted in state court counsels against federal review of defaulted claims." *House v. Bell*, 547 U.S. 518, 537 (2006). To the extent Wilson asserts actual innocence of the underlying crime, he would have to show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 523 U.S. at 327. To the extent he "challenges his death sentence in particular, he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559-60 (1998) (quoting *Sawyer*, 505 U.S. at 348). Wilson has not come close to making either of these showings. Thus, the Court does not find this an "extraordinary case" where procedurally defaulted claims may be considered due to Wilson's actual innocence. *Schlup*, 513 U.S. at 324.

IV. CONCLUSION

For the reasons explained above, Wilson's petition for writ of habeas corpus is **DENIED**.

CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a Certificate of Appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A). As amended effective December 1, 2009, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a [COA] when it enters a final order adverse to the applicant," and if a COA is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)."

The Court can issue a COA only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the Court must determine "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). If a procedural ruling is involved, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Under this standard, the Court issues a COA on the following issue: Whether trial counsel was ineffective during the penalty phase by failing to conduct a reasonable investigation into mitigation evidence and by failing to make a reasonable presentation of mitigation evidence.[88]

In relation to all other claims, grounds, and issues raised in Wilson's Petition for Writ of Habeas Corpus (Doc. 1), the Court finds the standard shown above for the grant of a COA has not been met.

SO ORDERED, this 19th day of December, 2013.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

[88] This issue is part of Claim Two in Wilson's Petition for Writ of Habeas Corpus and is addressed in pages 17-73 of this Order. (Doc. 1 at 11-22).

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-10681

D.C. Docket No. 5:10-cv-00489-MTT

MARION WILSON, JR.,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(December 15, 2014)

Before ED CARNES, Chief Judge, and WILLIAM PRYOR and JORDAN, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

Marion Wilson, Jr., a Georgia prisoner sentenced to death for the murder of Donovan Corey Parks, appeals the denial of his petition for a writ of habeas corpus. Wilson argues that he was deprived of a fair trial because his counsel provided ineffective assistance

during the penalty phase of his trial. In state postconviction proceedings, Wilson argued that his trial counsel were constitutionally ineffective because they failed to discover and introduce mitigating evidence. The state trial court ruled that Wilson's claim of ineffective assistance of counsel failed, and the Supreme Court of Georgia declined to review that decision. Because the Supreme Court of Georgia could have reasonably concluded that counsel provided Wilson effective assistance, we affirm the denial of Wilson's petition for a writ of habeas corpus.

I. BACKGROUND

We divide our discussion of the background in two parts. First, we discuss the facts of Parks's murder and the evidence presented at Wilson's trial. Second, we discuss the additional evidence presented during Wilson's state habeas proceeding.

A. Wilson is Convicted of Malice Murder and Sentenced to Death.

In 1996, Marion Wilson, Jr. and Robert Earl Butts killed Donovan Parks in Milledgeville, Georgia. *Wilson v. State*, 525 S.E.2d 339, 343 (Ga. 1999). Wilson and Butts approached Parks in a Wal-Mart parking lot to ask for a ride. *Id.* Wilson, Butts, and Parks then entered Parks's automobile. *Id.* A few minutes later, Parks's dead body was found nearby on a residential street. *Id.* Parks's clothing was saturated with blood, and he had a "gaping" hole in the back of his head. His

skull was filled with metal shotgun pellets and a spent shotgun shell, which suggested that he was shot at close range.

After officers arrested Wilson, he told the officers that after Parks got in the automobile, Butts pulled out a sawed-off shotgun and ordered Parks to drive around. *Id.* According to Wilson, Butts later told Parks to exit the automobile and lie on the ground, after which Butts shot Parks in the back of the head. *Id.* Wilson and Butts drove Parks's automobile to Atlanta in an attempt to locate a "chop shop" to dispose of the automobile. *Id.* They were unable to find a "chop shop" so they purchased gasoline cans, drove to Macon, and burned the automobile. *Id.* Police later searched Wilson's residence and found a "sawed-off shotgun loaded with the type of ammunition used to kill Parks" and notebooks filled with handwritten gang creeds and symbols. *Id.*

At trial, Wilson was represented by two appointed attorneys, Thomas O'Donnell Jr., who served as lead counsel, and Jon Philip Carr. *Wilson v. Humphrey*, No. 5:10-CV-489 (MTT), 2013 WL 6795024, at *10 (M.D. Ga. Dec. 19, 2013). They argued that Wilson was "mere[ly] presen[t]" during Butts's crimes, *id.* at *34, but the jury convicted Wilson "of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun," *id.* at *2.

During the penalty phase, defense counsel argued that the jury should not sentence Wilson to death because there was residual doubt about his guilt. *Id.* at *16. They presented evidence that Butts gave inconsistent statements to the police and that Butts confessed to three other inmates that he was the triggerman. Trial counsel again tried to convince the jury that Wilson was "mere[ly] presen[t]" during the crimes.

Trial counsel introduced testimony from Wilson's mother, Charlene Cox. She testified that Wilson had a difficult childhood and did not deserve to die even though he had a history of criminality. She explained that Wilson's father played no role in Wilson's upbringing, that she supported Wilson by working low-wage jobs, and that Wilson had an 18-month-old daughter.

Trial counsel also introduced testimony from Dr. Renee Kohanski, a forensic psychiatrist. *Id.* at *20. Kohanski relied on the records defense counsel requested from agencies, schools, and medical facilities, and interviewed Wilson to create a "cursory" social history, but she did not conduct an independent investigation of Wilson's background. *Id.* at *20-21. Kohanski testified that Wilson had a difficult, sickly, and violent childhood. She explained that Wilson was so aggressive as a child that his elementary school performed a psychological assessment of him. *Id.* at *25. The assessment found that Wilson had difficulty staying on task, a poor self-image, and an "excessive maternal dependence." *Id.* Kohanski told the jury that school officials also requested a medical evaluation because

they suspected that Wilson suffered from an attention deficit disorder, but testing was never performed. *Id.* She testified that Wilson had no parental support or male role model, and that, by age 9 or 10, he fended for himself on the streets and joined a gang as a substitute for a family. *Id.* Kohanski told the jury that Cox's boyfriends "came and went" and frequently used drugs. *Id.* Kohanski testified about one "not . . . uncommon event" in which six- or seven-year-old Wilson witnessed Cox's "common law" husband hold a gun to Cox's head. *Id.*

On cross-examination, both Cox and Kohanski testified about unfavorable background evidence. Cox admitted that Wilson was incarcerated for every day of his daughter's life, *id.* at *26, and that Cox had difficulty raising Wilson and sometimes needed police assistance to control Wilson. Kohanski told the jury that Wilson is of average intelligence and suffers from no known brain damage, but that he was in two car accidents as a child and she "would have been interested to see [brain imaging scans from] that time" to look for brain damage. She also testified that, regardless of any possible brain damage, Wilson knew right from wrong at the time of the murder.

The prosecution then presented evidence of Wilson's extensive criminal history. The jury heard that, from the age of 12 years, Wilson was "either out committing crimes or . . . incarcerated somewhere." *Id.* at *22. The jury heard that Wilson had been charged with first degree arson, criminal trespass, and possession of crack cocaine with intent to distribute, and that in a

period of eleven weeks Wilson was charged with ten misdemeanor offenses. *Id.* at *22-24. The jury heard that, as a 15-year-old, Wilson shot a stranger, Jose Valle, in the buttocks because he "wanted to see what it felt like to shoot somebody," and that Wilson sold crack cocaine to Robert Underwood and then shot him five times and "casually walked off." *Id.* at *22-23. The jury also heard testimony that Wilson was charged with cruelty to animals after he "shot and killed a small dog for no apparent reason." *Id.* at *23.

The prosecution also presented evidence of Wilson's violence and gang activity. The jury heard that Wilson threatened a neighbor, saying "I'll blow . . . that old bitch's head off"; Wilson committed unprovoked attacks on his schoolmates; and Wilson attacked one of the employees during his incarceration at Claxton Regional Youth Development Center. *Id.* at *22-23. The jury heard details of an incident in which a "belligerent" Wilson and five others were shouting at students in a parking lot at Georgia College. *Id.* at *23. When police arrived, Wilson rushed one of the officers and had to be subdued with pepper spray when he attempted to grab the officer's gun. *Id.* The jury heard portions of Wilson's post-arrest interrogation in which he confessed that he was the "God damn chief enforcer" of the Milledgeville FOLKS gang, a rank he achieved by "fighting and stuff like that." *Id.* at *24.

At the close of testimony, the trial court instructed the jury to consider all of the evidence from both the guilt and penalty phases of trial. After deliberating for less than two hours, the jury sentenced Wilson to death

for the crime of malice murder. *Id.* at *26. The Supreme Court of Georgia affirmed Wilson's conviction and sentence on direct appeal. *Id.* at *2.

B. Wilson Petitions for a Writ of Habeas Corpus and Introduces Mitigation Evidence that His Trial Counsel Failed to Present.

Wilson filed a petition for a writ of habeas corpus in a state court, in which he argued that his trial counsel had been ineffective because they failed to investigate his background thoroughly and to present adequate mitigation evidence at his sentencing. *Id.* at *13; *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Wilson argued that effective counsel would have interviewed teachers, social workers, and relatives to find mitigation evidence from Wilson's childhood. *Wilson*, 2013 WL 6795024, at *13. He argued that sufficient counsel would have discovered the names of potential witnesses in the records that his trial counsel possessed but never read. *Id.* at *15.

At an evidentiary hearing, Wilson's trial counsel testified that they were "confus[ed]" about who was responsible for investigating Wilson's background. *Id.* at * 12. Lead counsel O'Donnell testified that he told Carr and an investigator, William Thrasher, to "go out and investigate [Wilson's] background." *Id.* at *17. But Carr testified that he "was not involved in as much of the mitigation stage" because he believed O'Donnell was responsible for the investigation. *Id.* at *11. Thrasher testified that he was not "directed to conduct

[an] investigation into . . . Wilson's life history for mitigating information." *Id.* at *12.

Wilson introduced evidence that the social services, school, and medical records in the possession of Wilson's trial counsel contained mitigating information about Wilson's childhood homes and physical abuse by parental figures, and names of potential mitigation witnesses. *Id.* at *17-18. Trial counsel failed to explore any of the potential leads or witnesses found in the records. *Id.* at *17. Trial counsel testified that they relied on Kohanski to read the records and construct a social history of Wilson's life. They also testified that they were aware of the information in Wilson's records, but they made the strategic decision to focus on residual doubt instead of bringing in that evidence because it "would basically convince the jury that [Wilson] probably was the trigger man."

Wilson introduced 127 exhibits and 9 witnesses that were either directly from or referenced in the records, or could have been discovered through investigation of references in the records. *Id.* at *26. Wilson introduced lay testimony from his former teachers, family members, friends, and social workers. *Id.* at *26-29. He also introduced expert testimony from neuropsychologist Dr. Jorge Herrera and Kohanski. *Id.* at *29-30.

Wilson argued that the lay testimony could have been used to explain Wilson's disruptive childhood behavior and portray Wilson as someone who never stood a chance. Teachers testified that Wilson was a "tender

and good" boy who "had a lot of potential" and "loved being hugged," and that if Wilson had "been afforded appropriate treatment, attention, guidance, supervision[,] and discipline in his early years, there is a good chance" he would not be on death row. Family members and friends testified that some of Wilson's childhood homes lacked running water and electricity and were littered with containers full of urine. *Id.* at *26. They also testified that Cox's live-in boyfriends "slapp[ed]," "punch[ed]," and "once pulled a knife on" Wilson and that, for a period of a few months, Wilson and Cox lived with Cox's father, who beat Wilson with a belt. *Id.* at *29. Social workers testified that Wilson's young life included every "risk factor" they could think of, *id.* at *28, and that Wilson responded well to structure but his childhood was entirely unstructured, *id.* at *27.

Wilson argued that the expert testimony could have been used to explain Wilson's poor judgment skills and lack of impulse control. Herrera testified that his neuropsychological testing found that Wilson had "mild to severe impairments in brain function[], with severe impairment localized in the frontal lobes." *Id.* at *30. Herrera opined that "Wilson's association with [Butts] on the night of the crime and his failure to intervene at the time is consistent with the concrete thinking and judgment problems associated" with Wilson's brain injuries. Kohanski confirmed Herrera's assessment and testified that Herrera's testing should have been performed before Wilson's trial. *Id.* at *30. Kohanski testified that Wilson's frontal lobe injuries

"indicate[] that [he] . . . is a highly suggestible individual, easily led by others in certain situations."

The state trial court ruled that Wilson did not receive ineffective assistance of counsel. The state trial court ruled that trial counsel's performance was not deficient and, alternatively, that Wilson suffered no prejudice. *Wilson*, 2013 WL 6795024, at *31. Wilson filed an application for certificate of probable cause to appeal the denial of his petition, which the Supreme Court of Georgia summarily denied.

Wilson petitioned for a writ of habeas corpus in the district court, which denied him relief. The district court ruled that the decision of the state trial court as to prejudice did not involve an unreasonable application of clearly established federal law and that the material findings of fact were reasonable. *Id.* at *38. The district court granted Wilson a certificate of appealability.

II. STANDARD OF REVIEW

We review *de novo* the denial of a petition for a writ of habeas corpus. *Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229, 1232 (11th Cir. 2008). "Under [the Antiterrorism and Effective Death Penalty Act of 1996], a federal court may not grant a habeas corpus application 'with respect to any claim that was adjudicated on the merits in State court proceedings,' 28 U.S.C. § 2254(d), unless the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States,' § 2254(d)(1)." *Johnson v. Upton*, 615 F.3d 1318, 1329 (11th Cir. 2010) (quoting *Berghuis v. Thompkins*, 560 U.S. ___, 130 S. Ct. 2250, 2259 (2010)). "[T]his standard [is] 'a highly deferential' one that 'demands that state-court decisions be given the benefit of the doubt.' *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 130 S. Ct. 1855, 1862 (2010)). The decision of a state court is "contrary to" federal law only if it "contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts." *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1355 (11th Cir. 2009) (internal quotation marks and citation omitted). The decision of a state is an "unreasonable application" of federal law if it "identifies the correct governing legal principle as articulated by the United States Supreme Court, but unreasonably applies that principle to the facts of the petitioner's case, unreasonably extends the principle to a new context where it should not apply, or unreasonably refuses to extend it to a new context where it should apply." *Id.* "The question under [the Act] is not whether a federal court believes the state court's determination was correct but whether that determination was unreasonable – a substantially higher threshold." *Id.* (internal quotation marks and citation omitted).

"[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, ___, 131 S. Ct. 770, 785 (2011) (internal quotation marks and citation omitted) (emphasis omitted). "To obtain habeas relief

'a state prisoner must show that the state court's ruling on the claim being presented in the federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (quoting *Harrington*, 131 S. Ct. at 786-87). When we evaluate a petition of a state prisoner, we "'must determine what arguments or theories supported or, [if none were stated], could have supported[] the state court's decision; and then [we] must ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court].'" *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) (alterations in original) (quoting *Reese*, 675 F.3d at 1286-87).

III. DISCUSSION

As an initial matter, the one-line decision of the Supreme Court of Georgia denying Wilson's certificate of probable cause is the relevant state-court decision for our review because it is the final decision "on the merits." *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008); *see also Jones v. GDPC Warden*, 753 F.3d 1171, 1182 (11th Cir. 2014). Instead of deferring to the reasoning of the state trial court, we ask whether there was any "reasonable basis for the [Supreme Court of Georgia] to deny relief." *Harrington*, 131 S. Ct. at 784.

Wilson argues that his trial counsel were ineffective because they failed to investigate his background and present mitigation evidence at his sentencing. To obtain relief, Wilson must establish both that his trial counsel's "performance was deficient, and that the deficiency prejudiced [his] defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2529 (2003). Unless he establishes both requirements, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. And "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697, 104 S. Ct. at 2069.

To establish prejudice, Wilson had to prove "that [his] counsel's errors were so serious as to deprive [him] of a fair trial." *Id.* at 687, 104 S. Ct. at 2064. Wilson challenged his trial counsel's performance during the penalty phase of his trial, so he had to establish that "there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S. Ct. at 2069. To decide whether there is a reasonable probability of a different result, "we consider 'the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding' – and 'reweig[h] it against the evidence in aggravation.'" *Porter v.*

McCollum, 558 U.S. 30, 41, 130 S. Ct. 447, 453-54 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 1515 (2000)) (alteration in original).

The Supreme Court of Georgia could have reasonably concluded that Wilson failed to establish that he was prejudiced. The Supreme Court of Georgia could have reasonably concluded that Wilson's new evidence would not have changed the overall mix of evidence at his trial. His new evidence presented a "double-edged sword," *Evans*, 703 F.3d at 1324, and was "largely cumulative" of evidence trial counsel presented to the jury, *Holsey v. Warden, Ga. Diag. Prison*, 694 F.3d 1230, 1260-61 (11th Cir. 2012).

The Supreme Court of Georgia could have reasonably concluded that the balance of the evidence at Wilson's trial would have been unaffected by the new lay testimony. The teachers' testimony might have "humanized" Wilson, and other lay witnesses' testimony might have offered more detailed accounts of Wilson's home life, but that testimony was a "double-edged sword." *Evans*, 703 F.3d at 1324. The teachers' "mitigation" testimony would have also revealed that Wilson was "disruptive" in school, and the social service workers' "mitigation" testimony would have added that one of the investigations into Wilson's home life was terminated prematurely because Wilson was incarcerated.

The lay witness' testimony would have been undermined by other new evidence that "almost certainly would have come in with [the new lay testimony]."

Wong v. Belmontes, 558 U.S. 15, 20, 130 S. Ct. 383, 386 (2009). Reports in Wilson's school records stated that Wilson had an "'I don't care' attitude," and that he was physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct. A report from the Department of Family and Children Services recommended that Wilson remain in his mother's care, and a representative from the Department testified that the Department would "certainly not" have made that recommendation if the home had been unsafe or Wilson had been deprived of food or necessities. And the lay witnesses' testimony that Wilson was physically abused and neglected would have been undermined by the witnesses' uncertainty, Wilson's repeated denials that he was physically abused as a child and school and medical records that described Wilson as "healthy," "clean," "well dressed," "well developed," and "well nourished."

The Supreme Court of Georgia could have reasonably concluded that the balance of the evidence at Wilson's trial also would have been unaffected by the new expert testimony. Herrera assessed Wilson using his own interpretive standards for the neuropsychological tests he administered on Wilson, instead of accepted, authoritative standards. Herrera testified that Wilson's test scores for attention, ability to focus, distractability, and impulsiveness were considered "normal" under the accepted, authoritative standards. Because Herrera recommended against neurological imaging, his conclusion that Wilson had frontal lobe damage was based on only Herrera's unique interpretation of

the tests. And the state court could have ruled that Kohanski's new conclusions were unreliable because they were based on Herrera's unreliable results.

Herrera's and Kohanski's expert testimony conflicted with other evidence. They testified that a person with Wilson's test results would be susceptible to suggestion and more of a follower than a leader. But other evidence established that Wilson had risen to the rank of "God damn chief enforcer" of the Milledgeville FOLKS gang and was the "clear leader of the group" during the incident at Georgia College.

The Supreme Court of Georgia could have also reasonably concluded that Wilson's new evidence was "largely cumulative" of the evidence trial counsel presented to the jury. *Holsey*, 694 F.3d at 1260-61. The evidence presented at trial and the new evidence "tell the same story," *id.* at 1267, of an unhealthy child, who came from an unstable home and received no parental supervision. The jury heard that, from the age of 9 or 10, Wilson lived on the streets in a difficult neighborhood. His father figures "came and went" and frequently used drugs. One such father figure held a gun to Wilson's mother's head in view of Wilson. Wilson struggled with his identity and joined a gang as a substitute for family. The jury also heard humanizing characteristics, such as Cox's plea to spare Wilson's life for the sake of his 18-month-old daughter, and that Wilson's biological father had no role in Wilson's life. And Kohanski testified that she would have liked to see images of Wilson's brain to confirm that he did not have a brain injury.

The Supreme Court of Georgia could have reasonably concluded that the new evidence "tells a more detailed version of the same story told at trial," *id.* at 1260-61. Wilson's new evidence revealed more details of his difficult background and included additional humanizing stories and speculation about brain damage. The only new revelation at Wilson's evidentiary hearing was that the men in Wilson's life abused him. But the evidence of this abuse "was relatively limited in scope and . . . [not] descripti[ve]." *Id.* at 1282; *cf. Cooper v. Sec'y of Dep't of Corr.*, 646 F.3d 1328, 1337, 1349 (11th Cir. 2011). Reasonable jurists could rule that this evidence was "largely cumulative" of the other evidence of Wilson's neglectful childhood. *Holsey*, 694 F.3d at 1260-61.

The Supreme Court of Georgia could have looked at the overall mix of evidence, aggravating and mitigating, old and new, and reasonably determined that a jury would have still sentenced Wilson to death. The jury at Wilson's trial heard a large amount of graphic, aggravating evidence, and it would be reasonable to conclude that Wilson's new evidence was as hurtful as it was helpful, and largely cumulative of the evidence presented at trial. We cannot say that the decision of the Supreme Court of Georgia to deny Wilson's petition was [sic] "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1).

IV. CONCLUSION

We **AFFIRM** the denial of Wilson's petition for a writ of habeas corpus.

ED CARNES, Chief Judge, concurring:

I join all of the Court's opinion but write separately to emphasize how heavily Wilson's criminal history weighs on the aggravating side of the sentencing scale. The weight on that side of the scale is an important factor that must be taken into account in determining whether the failure to present all available mitigating circumstance evidence was prejudicial. *See Bobby v. Van Hook*, 558 U.S. 4, 1113, 130 S. Ct. 13, 19-20 (2009); *Reed v. Sec'y, Fla. Dep't. of Corr.*, 593 F.3d 1217, 1240-41 (11th Cir. 2010); *Hall v. Head*, 310 F.3d 683, 705-06 (11th Cir. 2002).

There is nothing inaccurate in the Court's two-paragraph summary of the evidence that the jury heard about Wilson's history of criminal behavior. Still, the district court's more detailed and chronological recounting of that history, drawn from the evidence presented to the jury at sentencing, is worth quoting. It shows how continuously and relentlessly anti-social and violent Wilson was, beginning with his commission of arson when he was 12 years old and culminating in capital murder seven years later:

> The State's 22 witnesses in the sentencing phase of Wilson's trial testified regarding

Wilson's lengthy criminal history and gang affiliation. The jury heard Wilson [D.O.B. July 29, 1976] started committing serious felonies when he was twelve and since then was "either out committing crimes or . . . incarcerated somewhere."

On January 31, 1989, twelve-year-old Wilson and two other boys started a fire in a vacant duplex apartment in Glynn County. The residents of the attached unit were home at the time. All three boys were charged with first degree arson and criminal trespass.

John J. Schrier testified he and his mother lived next door to Wilson in Glynn County in 1989. After Schrier's mother, an elderly heart patient, complained that [twelve- or thirteen-year-old] Wilson was harassing her and her dogs, Schrier asked Wilson to leave his mother and her dogs alone. Wilson responded, "I'll blow you and that old bitch's head off."

Former McIntosh County Sheriff's Deputy Robert Wayne Hoyt testified that on December 16, 1991, fifteen-year-old Wilson shot Jose Luis Valle, a Mexican migrant worker. Brian Keith Glover testified he and his two cousins were with Wilson the night he shot Valle. According to Glover, they were standing in the parking lot of a convenience store when Valle, a stranger to them all, walked past and into the store. Wilson announced he was going to rob Valle and that he "wanted to see what it felt like to shoot somebody." Wilson, who

had a pistol, approached Valle as he left the store. When Valle raised his arms in the air and turned to run, Wilson shot him in the buttocks. Glover testified that approximately one week after the incident, Wilson, who was again carrying a gun, threatened him because of the statement Glover gave law enforcement about Valle's shooting. Glover's cousin, Oscar Woods, corroborated Glover's story. The charges against Wilson were dead-docketed because the authorities were unable to locate Valle after he was discharged from the hospital.

After Wilson was charged with shooting Valle, he was incarcerated at the Claxton Regional Youth Development Center ("Claxton RYDC"), where he attacked Steve Nesmith, a youth development worker. Nesmith testified Wilson assaulted him, kneed him in the groin, grabbed his legs, and shoved him into a steel door. After a struggle, another worker and a detainee helped Nesmith subdue Wilson. Nesmith testified that during the two years he worked at the Claxton RYDC, Wilson was the only detainee who ever attacked him.

Daniel Rowe testified he attended school with Wilson. In January 1993, [sixteen-year-old] Wilson and another boy attacked him at school as he was drinking from a water fountain. Later the same day, the two again attacked him.

Corporal Craig Brown of the Glynn County Police Department testified that on

June 9, 1993 [sixteen-year-old] Wilson shot and killed a small dog for no apparent reason. Juvenile Court Administrator Phillip Corbitt testified Wilson was charged with cruelty to animals and, at a June 25, 1993 arraignment, admitted shooting the dog.

On June 10, 1993, the day after he was charged with shooting the dog, Wilson was charged with possession of crack cocaine with intent to distribute.

A little more than one month later [and three days shy of his seventeenth birthday], Wilson shot Robert Loy Underwood. Underwood testified that on July 26, 1993 he drove into a neighborhood to look for day labor. While there, he purchased crack cocaine from two boys. As he drove away, something struck him in the head. When he turned to see what had hit him, he saw Wilson, who was pointing a pistol at him. Wilson then shot five times into the cab of Underwood's truck. One bullet struck Underwood in the head; another traveled through his arm and lung before lodging in his spine. Underwood said Wilson then "turned around and just casually walked off." Underwood was hospitalized for six days. Wilson was charged with the shooting, and Underwood identified Wilson as the shooter during the juvenile proceedings.

Detective Ted McDonald with the Glynn County Police Department testified Wilson gave a statement in which he claimed he acted in self-defense when he shot Underwood.

However, according to McDonald, Underwood's wounds were not consistent with Wilson's claims of self-defense. Juvenile Court Administrator Corbitt testified Wilson admitted shooting Underwood during a juvenile court hearing.

Sergeant Brandon Lee, an officer with the Georgia College Department of Public Safety in Milledgeville, testified that on May 25, 1995, not quite two months after Wilson's release from the Milledgeville YDC, he found [eighteen-year-old] Wilson and five others in a Georgia College parking lot shouting at college students. When Lee asked them to leave the campus, Wilson, whom Lee described as the obvious leader of the group, became belligerent. The group then moved to another parking lot two blocks away where they got involved in another verbal confrontation with students. When campus police arrived and again asked the group to leave the campus, Wilson began shouting "gang language" in Lee's face and refused to leave. As Lee tried to place Wilson under arrest, Wilson charged another officer and attempted to grab the officer's handgun. A struggle ensued, and Wilson ultimately had to be pepper sprayed. After the confrontation, Wilson was arrested and charged with failure to leave campus as directed by an officer and felony obstruction of an officer. Wilson pled guilty to the charges and was banned from the campus.

> Steven Roberts, formerly a law enforcement officer with the Georgia College Department of Public Safety, testified that on August 1, 1995, Wilson [who had just turned nineteen] was charged with driving the wrong way on a one-way street and, because he ran when officers approached his car, obstruction of an officer. Roberts also testified he saw Wilson on the Georgia College campus on September 28, 1995. Knowing he had been banned from the campus, Roberts approached [nineteen-year-old] Wilson to arrest him for trespassing. When instructed to place his hands on the car, Wilson ran.
>
> Maxine Blackwell, Solicitor of Baldwin County State Court, testified Wilson had been charged with approximately ten misdemeanor offenses during an eleven week period in 1995 and was sentenced to serve 60 to 120 days in a detention center.

(Bracketed material added; citations to record and footnotes omitted.)

Wilson's wholehearted commitment to antisocial and violent conduct from the age of 12 on not only serves as a heavy weight on the aggravating side of the scale, it also renders essentially worthless some of the newly proffered mitigating circumstance evidence. For example, a number of Wilson's teachers signed affidavits, carefully crafted by his present counsel, claiming that Wilson was "a sweet, sweet boy with so much potential," a "very likeable child," who was "creative and intelligent," and had a "tender and good side." One

even said that Wilson "loved being hugged." A sweet, sensitive, tender, and hug-seeking youth does not commit arson, kill a helpless dog, respond to a son's plea to quit harassing his elderly mother with a threat "to blow . . . that old bitch's head off," shoot a migrant worker just because he "wanted to see what it felt like to shoot someone," assault a youth detention official, shoot another man in the head and just casually walk off – all before he was old enough to vote.

Without provocation Wilson shot a human being when he was fifteen, shot a second one when he was sixteen, and robbed and shot to death a third one when he was nineteen. Those shootings and his other crimes belie the story that his present counsel put forward in the affidavits from his former teachers, which are part of the new mitigating circumstance evidence. *See Bobby v. Van Hook*, 558 U.S. 4, 12, 130 S.Ct. 13, 19 (2009) ("[T]he affidavits submitted by the witnesses not interviewed shows their testimony would have added nothing of value.').

Given Wilson's lifelong commitment to violent crime, and his utter indifference to human life, reasonable jurists could easily conclude, as the Florida Supreme Court did, that there is no reasonable probability of a different result if his trial counsel had discovered and presented the additional mitigating circumstance evidence that he claims they should have.

No. 14-10681

In the United States Court of Appeals
For the Eleventh Circuit

MARION WILSON, JR.,

Petitioner-Appellant,

v.

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia, No. 5:10-cv-00489-MTT

CORRECTED *EN BANC* BRIEF OF COURT-APPOINTED *AMICUS CURIAE*

(Filed Oct. 9, 2015)

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No. 14-10681
MARION WILSON, JR. v. WARDEN, GEORGIA DIAGNOSTIC PRISON

[Certificate Of Interested Persons And Corporate Disclosure Statement Omitted]

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[1] STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae counsel submits this brief in response to this Court's order of September 23, 2015. While the Court instructed counsel to argue the proposed question in the negative, this is also counsel's previously-held position. *Amicus* counsel has taught Federal Habeas Corpus at the University of Chicago Law School since 2007 as a Lecturer-In-Law. The positions taken herein are solely those of counsel and not necessarily those of the University of Chicago Law School nor its other faculty.

SUMMARY OF THE ARGUMENT

When a state prisoner's federal habeas claim has been "adjudicated on the merits" in state court, the deferential standard of 28 U.S.C. § 2254(d) applies. Whether that adjudication is from a trial court, intermediate appellate court, or the state supreme court, there is still only a single decision that is the subject of a § 2254(d) analysis – the "last state-court adjudication on the merits." *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011). This uncontroverted interpretation of § 2254(d) makes sense because only the last decision can be the continuing legal cause of the prisoner's alleged unlawful custody. Prior merits rulings from inferior state courts are thus irrelevant where the state supreme court has subsequently acted. Analyzing the reasoning of those non-operative lower court rulings would ask a question § 2254(d) does not.

[2] This is so whether or not the state supreme court provides an explanation of its decision, because § 2254(d) affords federal courts no discretion to discard an unexplained denial of relief on the merits by referring instead to the previous decision of a lower state court. When reasoning is not given in the last state-court adjudication on the merits, the federal court should apply *Harrington v. Richter*, 562 U.S. 86, 98 (2011) and ask whether the petitioner has shown there was "no reasonable basis" for the denial of relief.

Petitioner and the State see it otherwise, based primarily on an imprecise reading of recent Supreme Court cases and an unthoughtful over-reading of *Ylst*

v. Nunnemaker, 501 U.S. 797 (1991). The Supreme Court *dicta* the parties rely on does not address summary state adjudications *on the merits*. Instead those decisions contain merely the anodyne recounting of uncontroversial "looking through" *discretionary* denials of appellate *review* to locate the single operative adjudication on the merits. The strong federalism principles reflected in § 2254(d) and the deference regime embodied in its text foreclose the offensive pretense that a state supreme court adopted *in haec verba* the merits reasoning of one of its inferior courts. The Supreme Court does not tolerate this false presumption as to its summary affirmances and Congress did not create § 2254(d) to work this cavalier treatment of a merits decision of the Georgia Supreme Court.

That is why invoking *Ylst* to escape the deference § 2254(d) affords a state court's adjudication, explained or not, gets it precisely backwards. *Ylst* is a pre-[3]AEDPA decision shaping the judge-made law of procedural default, a doctrine crafted to vindicate federalism interests by respecting state procedural rules. Because a subsequent state-court merits decision can vitiate a previous procedural default, the rule of *Ylst* exists to protect states from such a consequence by engaging in the pro-federalism assumption that an unexplained affirmance rested on *procedural* grounds if the previous lower court opinion did. *Ylst* no more controls this case than it controls how to treat a Supreme Court summary affirmance, and it in no way adopts a general rule of interpretation of unexplained merits decisions.

Answering the Court's question in the positive would conflict with *Richter* and the text of § 2254(d) by ignoring a state supreme court's adjudication on the merits in favor of a prior lower court adjudication. No Supreme Court case confines *Richter* to the narrow circumstance where there is only one, unexplained, state court adjudication on the merits. More importantly, the text of § 2254(d) cannot be parsed to treat an unexplained ruling differently depending on whether there is a previous, explained, adjudication from a lower court. Because the words will not tolerate such abuse, the parties and those jurists taking this erroneous position have not even made a token effort to articulate how the text supports them. Finally, the conundrum this Court will next face if it answers the question as the parties would – what happens when the Supreme Court issues a new rule of federal law between the intermediate appellate court ruling and the unexplained state supreme court affirmance – presents a thought experiment that further shows why, with the greatest respect, the Ninth [4] Circuit, Justices Ginsburg and Kagan, the parties, and some others, have misread *Ylst*, § 2254(d), and *Richter*.

This Court asked a question:

> Is a federal habeas court required to look through a state appellate court's summary decision that is an adjudication on the merits to the reasoning in a lower court decision when deciding whether the state appellate court's decision is entitled to deference under 28 U.S.C. § 2254(d)?

The answer is no. A federal court can elect to analyze the reasoning provided by the lower court decision as one of the possible reasonable bases for the single operative adjudication – the state appellate court's summary decision on the merits – but only to support denial of the writ and not to surpass § 2254(d)'s bar. *Richter* provides the exclusive test for a habeas petitioner where the last state-court adjudication on the merits is unexplained.

ARGUMENT AND CITATIONS OF AUTHORITY

While the parties have contrived to make it difficult,[1] this case is simple. There can be only one operative state-court adjudication on the merits. If that one [5] adjudication is unexplained, *Richter* provides the

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[1] The parties' refusal to address just the question posed is one thing, but separate from that refusal is the lack of clarity (intentional or unintentional) as to whether cited authorities deal with adjudications on the merits that deny relief or discretionary denials of appellate review. *See, e.g.*, Wilson *En Banc* Brief ("Wilson Br.) at 15-17 (citing numerous cases "looking through" discretionary denials of review as if they "applied *Ylst* in *Richter*'s wake" when in reality they have nothing to do with *Richter* because the unexplained denial was not on the merits); *id.* (quoting Supreme Court using phrase " 'summary denial' " to describe *discretionary* denial of review by California Supreme Court in state court proceedings relevant to *Johnson v. Williams*, 133 S. Ct. 1088, 1094 n.1 (2013), while throughout his brief also naming the Georgia Supreme Court's ruling on the merits in this matter a "summary denial"). Calling a discretionary "*certiorari*-style" denial of appellate *review* by the same name as the adjudication on the merits denying *relief* in this case, without explanation, is unhelpful. *See also infra* at 14-18.

relevant test. There is no textual basis to parse unexplained decisions without prior inferior court reasoning from unexplained decisions with prior inferior court reasoning. An even cursory reading of *Ylst* shows that it is concerned with a different subject matter – whether a state court has ruled on a procedural or merits-based ground – and announced no general rule of interpreting unexplained appellate decisions.

The Supreme Court's invocation of *Ylst* when looking through discretionary "*certiorari*-style" denials of appellate review does not even begin to answer the question posed here. Justice Ginsburg's opinion concurring in the denial of *certiorari* in *Hittson v. Chatman*, 135 S. Ct. 2126 (2015) is, respectfully, like petitioner's brief, the product of "distinction without a difference" lawyering and more reflective of a pre-AEDPA academic view of the purpose of federal habeas corpus than any effort to interpret § 2254(d). Due consideration for the States requires that this Court not treat unexplained merits decisions from state appellate courts any differently than, for example, the Federal Circuit and the Supreme Court ask litigants and courts to treat their summary affirmances.

Finally, the federalism insult that the parties' position poses would only be exacerbated by the implications of possible intervening Supreme Court precedent or [6] new evidence. All agree that the date for determining "clearly established Federal law" is the date of the last state-court adjudication on the merits. 28 U.S.C. § 2254(d)(1). But, under the parties' erroneous rule, the reasoning of a prior state court decision is

measured against the law (and evidence) available at the later time of the unexplained adjudication on the merits. We go from assuming the reasoning is exactly the same to assuming that the state supreme court willfully ignored an intervening and on-point Supreme Court decision, or issued a ruling without consideration or discussion of new evidence. To pause to consider the implications of the parties' position is to refute it entirely. This Court should answer its question in the negative.

I. If The Last State Court "Adjudication On The Merits" Is Unexplained, *Richter* Provides The Test

A. The Only Operative "Adjudication On The Merits" For § 2254(d) Is The Latest State Court Decision

In *Greene*, the Court considered the question of what temporal body of law functions in the § 2254(d)(1) inquiry as "clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* Relying on its earlier decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) relating to the body of facts for review under § 2254(d)(1), the Court held that the law to be applied was the law as of the time of the "last state-court adjudication on the merits." *Greene*, 132 S. Ct. at 45. "State-court decisions are measured against this Court's precedents as of 'the time the state court [7] renders its decision.'" *Cullen*, 131 S. Ct. at 1399 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72

(2003)). Identifying that decision is the first task in a § 2254(d)(1) analysis.

The text of § 2254(d) refers to a single "adjudication" and a single resulting "decision." Thus, there is only one time at which to close the record (*Cullen*) and the Supreme Court Reports (*Greene*) for a federal court's analysis. Earlier decisions on the merits or later non-merits proceedings do not shift the focus of analysis. "A later affirmance of that decision on alternative procedural grounds, for example, would not be a decision *resulting from* the merits adjudication. And much less would be . . . a decision by the state supreme court not to hear the appeal – that is, not to decide at all." *Greene*, 132 S. Ct. at 45.

This makes sense because it is only the last state-court adjudication on the merits that is legally connected to the prisoner's continuing custody. *Cf. Coleman v. Thompson*, 501 U.S. 722, 730 (1991) ("a state prisoner is in custody *pursuant* to a judgment"). A later discretionary denial of appellate review is a nullity as it pertains to § 2254(d)(1). Analogously, to apply § 2254(d)(1)'s standards to the second-to-last adjudication on the merits would be an advisory opinion on a non-operative decision that has since been supplanted. *Greene* and *Cullen* foreclose such substitution well before *Richter* provides the test for unexplained adjudications.

While the parties do not clearly advocate disobedience to *Greene* and *Cullen* by declaring the December 1, 2008 state habeas court's decision the statutory [8]

"adjudication on the merits," they do so in effect.[2] They abuse the text of the statute and the rationale of *Ylst* to arrive at the legally baseless assumption that when the Georgia Supreme Court denies a CPC it does so for the exact reasons its inferior court denied relief. But neither party (nor any jurist who has shared their conclusion) has ever explained why the text of AEDPA

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[2] Petitioner again exceeds the scope of the *en banc* Court's question by arguing that the Georgia Supreme Court's denial of a CPC is not an "adjudication on the merits" in defiance of this Court's prior decisions. Wilson Br. 10 n.9; *contra Hittson v. GDCP Warden*, 759 F.3d 1210, 1231 (11th Cir. 2014); *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008). Petitioner then goes so far as to say that *Newland* was not about whether a CPC denial is an adjudication on the merits but instead the "distinct question of what constitutes 'clearly established Federal law'," Wilson Br. 11 n.10. Petitioner's view is irreconcilable with the holding of *Greene*, which petitioner did not address. The inquiry into what is "clearly established Federal law" is – find the "last," "state-court," "*adjudication on the merits.*" 132 S. Ct. at 45 (emphasis added).

Amicus counsel will keep to the confines of the assigned task, except to further note that petitioner appears to be wrongly suggesting that the CPC denial is not an "adjudication" or "judgment" but is instead akin to the denial of *certiorari*. *Id.* The Supreme Court has already decided for purposes of federal law that a Georgia CPC denial is a "final judgment" in granting a writ of *certiorari* to the Georgia Supreme Court's denial of a CPC in *Sears v. Upton*, 561 U.S. 945 (2010), a case petitioner cites. The Court in *Sears* held that it had jurisdiction under 28 U.S.C. § 1257, which permits review only of "[f]inal judgments or decrees" in state court. *Id.* at 946 n.1. If a CPC denial is a "[f]inal judgment" under § 1257(a), it assuredly is an "adjudication on the merits" for purposes of § 2254(d). And if the CPC was not a judgment or adjudication on the merits, the Supreme Court in *Sears* would have issued the writ to the state postconviction court, not the Georgia Supreme Court.

supports two divergent analytical modes to treat unexplained adjudications on the merits – one for when there is no previous adjudication and another for when there is. There is no such explanation.

[9] B. Whether There Is A Prior Adjudication On The Merits Is Irrelevant To The Mode Of Analysis Of The Last Adjudication

The text of § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As noted before, the text refers to a singular "adjudication" that "result[s]" in a singular "decision." Section 2254(d)(1) then instructs that a petitioner may obtain relief if that single adjudication and resulting decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States." *Id.* As the Court observed in *Richter*, "[t]here is no text in the statute requiring a statement of reasons." 562 U.S. at 98. And when the "last state-court adjudication on the merits," *Greene*, 132 S. Ct. at 45, is unexplained, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Petitioner's dissection of the text of § 2254(d) consists of a quote from Justice Ginsburg's *Hittson* concurrence in the denial of *certiorari* that is itself a misstatement of [10] the statutory scheme. Wilson Br. at 17-18 (saying that AEDPA's unidentified "express language . . . makes clear that a federal court must 'train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims'" (quoting *Hittson*, 135 S. Ct. at 2126 (Ginsburg, J., concurring in the denial of certiorari) (emphasis added on "s" in "courts"))). Whether a typographical error or intentional, Justice Ginsburg's sentence is wrong. The statutory text points to a single adjudication and its resulting decision, not some holistic review into how the "state courts" treated the petitioner. Such is the province for classroom discussion of relic pre-AEDPA academic theories, not courtroom debate today.

Nothing in the text requires the federal court to do what the parties endorse here – transpose the reasoning of a lower court opinion *in haec verba* into the unexplained adjudication on the merits of a state supreme court. The parties would have § 2254(d)(1)

say "resulted in, *or affirmed*, a decision that was contrary to. . . ." But it does not. And it is for good reason that the text of AEDPA directs the federal court only to the last adjudication and, in this case, the test of *Richter*. Only the last decision is the continuing cause of the prisoner's custody and thus the platform for federal court review. Only the last decision has the benefit of all the law (*Greene*) and all the evidence (*Cullen*) that the federal court will itself look to.

All the parties have to assail the statutory text of § 2254(d) is their poor over-reading of *Ylst*, ambiguous misreading of *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (and [11] other equally beside-the-point cases), and wrong-footed reliance on Justice Ginsburg's haste in *Hittson*.

C. *Ylst* Does Not Require Making The Undignified Assumption That Unexplained Affirmances Adopt *In Haec Verba* The Reasoning Of An Inferior Court

Ylst is a case about how to implement the procedural default doctrine in the face of state-court judgments that do not clearly delineate whether they rest on procedural or merits grounds. The citation has since come to stand also for the routine practice of "looking through" *certiorari*-style discretionary denials of appellate review to locate the proper state court "adjudication on the merits" for § 2254(d) purposes. It is not, as petitioner would have it, a general "rule of interpretation" that "gives meaning to a summary decision that

leaves in place an earlier reasoned decision," Wilson Br. 14 n.13. If it were, then the Supreme Court has done a poor job of implementing this rule as to its own summary affirmances, and this Court's sister, the Federal Circuit, has also failed to get the hidden message of interpretation from *Ylst*.

The procedural default doctrine creates the need for the bespoke *Ylst* presumption. It springs from the jurisdictional rule that the Supreme Court will not review, under 28 U.S.C. § 1257, state judgments that rest on an adequate and independent state ground. *Coleman*, 501 U.S. at 729-30. Resolution of the federal question would be advisory because it could not alter the judgment. *Id.*

> [12] In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31.

As "[s]tate procedural bars are not immortal [and] they may expire because of later actions by state courts," *Ylst*, 501 U.S. at 801, the Supreme Court adopted the presumption that if an earlier decision

does not rest on procedural grounds a later unexplained order upholding that judgment also does not and, conversely and more importantly, if an earlier decision does rest on procedural grounds a later unexplained order does as well. *Id.* at 803. There can be absolutely no doubt that *Ylst* in this format is limited to implementing the procedural default doctrine. The very next words that follow petitioner's favorite sentence – "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground," *id.* at 803 – qualify the scope of this presumption:

> If an earlier opinion "fairly appear[s] to rest primarily upon federal law," *Coleman*, 501 U.S., at 740, 111 S.Ct., at 2559, we will presume that *no procedural default* has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard *that bar* and consider the merits.

[13] *Id.* (emphases added). *Ylst* implements the adequate and independent state ground doctrine by not allowing States to have their procedural rules defeated through silent and unexplained orders. That is all.

And, notably, *Ylst* never endorses the petitioner's microscopy of assuming the later unexplained order

adopted *precisely* the same reasons (e.g. "*we also would apply* Strickland *in exactly the same way to achieve exactly the same result as the lower court did*"), instead looking to the macroscopic "grounds" – procedural or not.[3] The Supreme Court has not perverted *Ylst* into the insult that petitioner would make it – the crude assumption that the Georgia Supreme Court is a rubber stamp that denies a CPC *on the merits* for the identical reasons its inferior court did.

Nor will the Supreme Court do so. Because to adopt the parties' view would fly in the face of how the Court treats its own unexplained summary affirmances. These affirm not reasoning but "only the judgment of the court below, and no more may be read into [its] action than was essential to sustain that judgment." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) (internal citations omitted). The Federal Circuit's unexplained affirmances get the same treatment. "[A] Rule 36 judgment simply confirms that the trial court entered the correct judgment. It does not endorse or reject any specific part of the trial court's reasoning." *Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012). To over-read *Ylst* [14] engages the false presumption that the Georgia Supreme Court does not deploy independent reasoning to its work. To over-read *Ylst* in light of how federal appellate courts treat their own summary affirmances is to transform that insult

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[3] *Richter*'s own discussion of *Ylst* is solely directed to this point regarding whether a ruling is procedural or merits-based. 562 U.S. at 99.

to the independence of the Georgia Supreme Court into an insult to federalism itself. Does anyone seriously believe that *Ylst* or § 2254(d) accomplish this or (less relevantly, but of interest) are intended to do so?[4]

But petitioner says that the Supreme Court "held" this in *Brumfield*. Wilson Br. 8. The parties can only get there by carelessly (or willfully) misreading the procedural posture of *Brumfield* and other authorities and relying on the minority view of two Justices who are not "final because [they] are infallible" and are only "infallible [] because [they] are final" when joined by three others. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

II. The Supreme Court Has Not Endorsed The Over-Reading Of *Ylst* That The Parties Advocate

In the state process leading to the Supreme Court's decision in *Brumfield*, the Louisiana Supreme Court denied, without explanation, an "application for a supervisory writ to review the trial court's ruling." 135 S. Ct. at 2275 (citing *Brumfield* [15] *v. State*, 885

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[4] Engage in the following thought experiment: what if the Georgia Supreme Court denied a CPC and said "Denied but for reasons independent of the denial of relief below." Would the parties still have their perverted "*Ylst*" presumption apply? Presumably not. But, if not there, then why should silence on the subject bind the Georgia Supreme Court adjudication on the merits to the reasoning of its inferior court? The only answer the parties' [sic] could provide to this question will amount to a rule requiring the Georgia Supreme Court to write opinions to explain itself. A rule that does not exist. *See Richter*, 562 U.S. at 99.

So. 2d 580 (La. 2009)). "Supervisory writs" in the Louisiana courts of appeals (including its Supreme Court) are discretionary, and therefore denying a supervisory writ is not an adjudication on the merits. 1 La. Civ. L. Treatise, Civil Procedure § 14:17 (2d ed.). No federal court has ever treated the denial of a supervisory writ by the Louisiana Supreme Court as an adjudication on the merits under § 2254(d). So when the Court in *Brumfield* cited *Ylst* and said "we, like the courts below, 'look through' the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state trial court's reasoned decision refusing to grant Brumfield an *Atkins* evidentiary hearing," 135 S. Ct. at 2276, it was deploying *Ylst* in the broader sense of looking for the operative adjudication on the merits. *Ylst* itself speaks of its "looking through" as a presumption that gives the "unexplained order[] . . . *no* effect." 501 U.S. at 804 (emphasis in original). That's what the Court in *Brumfield* was doing – giving the Louisiana Supreme Court's discretionary denial of review no effect. But § 2254(d), *Cullen*, *Richter*, and *Greene* absolutely preclude giving the "last state-court adjudication on the merits" no effect. To the extent anyone would ever over-read *Ylst* to say otherwise, the AEDPA makes them wrong.

But at least the Supreme Court has decidedly not read *Ylst* the way the parties do. Petitioner's breathless account that *Brumfield* "held that this Court had strayed off path [sic]" when this Court refused to "look through" a CPC denial, Wilson Br. 8, ignores the total inapplicability of *Richter* to *Brumfield*. The Louisiana

Supreme Court [16] discretionary denial of review was not eligible for *Richter*'s treatment because it was not an adjudication on the merits.

Brumfield is one of several cases that petitioner says show how the Supreme Court "post-Richter continue[s] to apply its 'look through' doctrine as the proper method for analyzing state court *decisions* that leave undisturbed a prior reasoned state court *decision*." Wilson Br. 15 (emphases added). Is the denial of a supervisory writ a "decision" within the meaning of § 2254(d)(1)? No. Yet ambiguous use of words like "decision" and phrases like "summary denial" can (and in the parties' briefs does) obfuscate whether the Supreme Court really has grappled with the question this Court is asking. It blurs the critical line between discretionary denials of *review* and merits-based denials of *relief*. That is the line that matters for purposes of § 2254(d). That is the line the parties are so keen to ignore.

Looing deeper, *Brumfield* cites *Johnson v. Williams*, 133 S. Ct. 1088, 1094 n.1 (2013) for application of the *Ylst* "no effect" look-through – where discretionary *certiorari*-style denials are not treated as adjudications on the merits. There, the Supreme Court, in reversing the Ninth Circuit on the merits, cited with approval the Ninth Circuit's opinion looking through the "California Supreme Court's summary denial of Williams' petition for review. . . ." *Johnson*, 133 S. Ct. at 1094 n.1. "Summary denial" is not the clearest of terms to use, and petitioner again takes full advantage. *See* Wilson Br. at vi, 2, 6, 8 (also calling the

Georgia Supreme Court's denial of a CPC in this case a "summary denial"). But reviewing the Ninth Circuit opinion reveals two [17] things. First, the "summary denial" that the Supreme Court said it was acceptable to "look through" was in fact, again, a *certiorari*-style discretionary denial of *review*, not *relief*. *Williams v. Cavazos*, 646 F.3d 626, 636 (9th Cir. 2011), *rev'd sub nom. Johnson v. Williams*, 133 S. Ct. 1088 (2013) ("As when the United States Supreme Court denies a petition for certiorari, the California high court's decision to deny a petition for review is not a decision on the merits, but rather means no more than that the court has decided not to consider the case on the merits."). Second, Judge Reinhardt in that opinion draws exactly the line that *amicus* counsel urges and § 2254(d) demands – leaving *Richter* to unexplained decisions on the merits and "looking through" only discretionary denials of relief. *Id.* at 635-36.[5] Judge Reinhardt did not refuse to apply *Richter* on the grounds that an earlier reasoned decision merely existed. He refused to apply it on the grounds that the unexplained denial of review was not a decision on the merits. He was right.

Petitioner's other authorities fare no better than this examination of *Johnson* and *Brumfield*. Wilson Br. 16-17. Three opinions on *certiorari* from the Sixth Circuit all analyze decisions from the Michigan Court of Appeals in circumstances where the Michigan Supreme Court denied discretionary review, not relief on

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[5] The Ninth Circuit subsequently ignored Judge Reinhardt's persuasive distinction in its erroneous decision *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013).

the merits. *Woods v. Donald*, 135 S. Ct. 1372, 1375 (2015) (reviewing lower court opinion because it was the last state-court adjudication on the merits and in no way ignoring *Richter*; *see People* [18] *v. Donald*, 482 Mich. 1006, 756 N.W.2d 87 (2008) (discretionary denial of *review* by Michigan Supreme Court that has nothing to do with *Richter* or this case)); *Burt v. Titlow*, 134 S. Ct. 10 (2013) (finding it unimportant to mention that the Michigan Supreme Court had in its discretion denied review; *see People v. Titlow*, 470 Mich. 867, 680 N.W.2d 900 (2004) (discretionary denial of *review* that has nothing to do with *Richter* or this case)); *Lafler v. Cooper*, 132 S. Ct. 1376, 1383, 1385, 1390 (2012) (reviewing lower court opinion not because of [sic] it was ignoring *Richter* and distorting *Ylst*, but because "[t]he Michigan Supreme Court denied respondent's application for leave to file an appeal" and therefore the Michigan Court of Appeals opinion was the last state-court adjudication on the merits; *see People v. Cooper*, 474 Mich. 905, 705 N.W.2d 118 (2005) (discretionary denial of *review* that has nothing to do with *Richter* or this case)).

That leaves *Premo v. Moore*, 562 U.S. 115 (2011), in which the Court analyzed a state trial court opinion where there was also apparently an unexplained adjudication on the merits from the Oregon Court of Appeals. Three observations dispose of *Premo*'s relevance here. First, the Court did not cite *Ylst* or say it was doing any "looking through." Second, the Court reversed the grant of the writ. This is important because *Richter*'s test is a condition of *granting* relief, and analysis

of *any* jurist's reasoning in denying relief, including any prior state court opinion adjudicating the claim, can be sufficient to show that the operative decision – the last state-court denial of relief – was reasonable. This is so because any reasoned opinion denying [19] relief is but one of the numerous possible hypothetical reasoned opinions that would also deny relief. Third, and most importantly, the Court did apply *Richter*'s test. *Premo*, 562 U.S. at 131 ("The state postconviction court *reasonably could have concluded* that Moore was not prejudiced by counsel's actions. Under AEDPA, that finding ends federal review. *See Richter*, 562 U.S. at ___, 131 S.Ct. 770." (emphasis added)). The Supreme Court committed no drive-by foul of the *Richter* decision in *Premo*.

Putting aside the opinions of a majority of the Supreme Court, there is still the *Hittson* opinion concurring in the denial of *certiorari* from Justice Ginsburg. It is easily disposed of, and is a useful example of why opinions respecting the grant or denial of certiorari are not the same as decisions on the merits. *See Huber v. N.J. Dep't of Envtl. Prot.*, 562 U.S. 1302 (2011).

In her short opinion, Justice Ginsburg addressed none of the arguments presented above but did dismiss the idea that a discretionary denial of review is different from an adjudication on the merits. *Hittson*, 135 S. Ct. at 2128 (Ginsburg, J., concurring in the denial of certiorari). Of course, the only reason she offered is that *Ylst* itself looked through "a nondiscretionary adjudication." *Id.* Her argument concluded with "[t]here is no reason not to 'look through' such adjudications, as

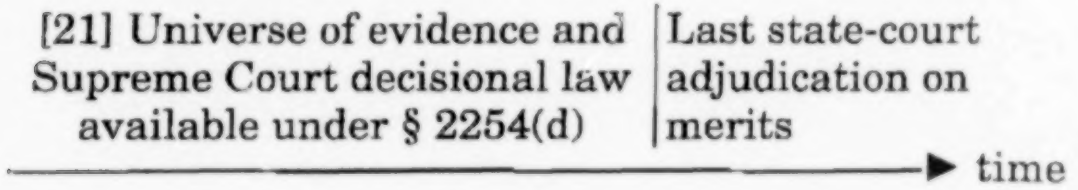
well, to determine the particular reasons why the state court rejected the claim on the merits." *Id.* Here are a few:

> [20] (1) *Ylst* involves protecting the adequate and independent state ground of a procedural default and must be invoked for non-discretionary adjudications if it is to have any meaning at all (discretionary denials of review do not need the *Ylst* presumption); whereas
>
> (2) § 2254(d)'s text only operates when we already know that there is an adjudication on the merits and under *Cullen* and *Greene* looks only to the last such state-court adjudication not earlier lower court opinions; and furthermore
>
> (3) to assume that the Georgia Supreme Court adopted the reasoning of its inferior court is contrary to how the Supreme Court treats its own summary affirmances, and perverts a federalism enhancing decision, *Ylst*, into an insult to the Georgia Supreme Court and federalism itself.

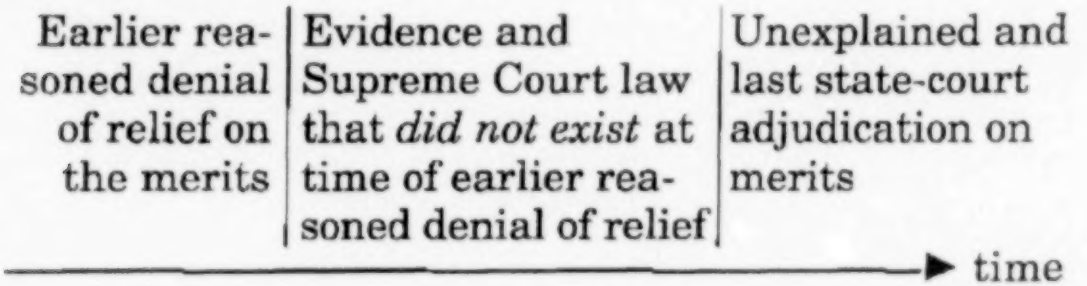
A fourth reason presents if one considers *Greene, Cullen*, and the corresponding body of law and facts to be applied to a § 2254(d) inquiry. The position of the parties is left an absurdity atop a federalism insult piled on atextual "analysis."

III. Adoption Of The Parties' Erroneous "Look Through" Approach Will Lead To Absurd Results

Greene and *Cullen* close the universe of law and facts as of the date of the last state-court adjudication. Thus, any evidence that was before the state court when it made that adjudication (*Cullen*) and any Supreme Court decision that issued prior to it (*Greene*) is fair game in deciding whether it "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).



Under the parties' view, if there is an earlier reasoned lower court opinion that precedes an unexplained adjudication on the merits, then the federal court must pretend that the later state-court adjudication adopted that reasoning. Thus, the § 2254(d) inquiry will be conducted against a body of law (and potentially evidence) that did not even exist at the time the last reasoned opinion issued.



Thus, the parties would have a federal court presuming that the exact same reasoning was applied by the later adjudicator even though the universe of evidence and law might be dramatically different. Imagine the Supreme Court made a new rule of criminal procedure, like *Apprendi v. New Jersey*, 530 U.S. 466 (2000), whereas the earlier state court had denied relief on the basis of pre-*Apprendi* case law? How would the parties' rule work for an unexplained affirmance on the merits that post-dated *Apprendi*? Well, we would assume that the state supreme court willfully ignored *Apprendi*, applied earlier and overruled case law, and the petitioner would surpass the [22] § 2254(d)(1) bar. It is hard to imagine a worse and less-correct assumption under the AEDPA than that the state supreme court cast aside controlling Supreme Court precedent. *Cf. Early v. Packer*, 537 U.S. 3, 8 (2002) (holding that § 2254(d)(1) applies and AEDPA "does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them").

Lest this Court dismiss the above – the specter of evaluating a sovereign state supreme court's merits decision using stale reasoning from its inferior court – it has already happened, in the Ninth Circuit. In *Cannedy*, the Ninth Circuit affirmed a grant of the writ, by measuring the lower state court opinion against the record evidence that existed at the time of the later, unexplained, state court adjudication on the merits. 706 F.3d at 1156 n.3. That included significantly more factual evidence (favorable to the

petitioner) presented to the California Supreme Court in connection with that court's unexplained denial of relief on the merits. *Id.* at 1169 (Kleinfeld, J., dissenting). Yet the Ninth Circuit, implementing the rule petitioner urges here, evaluated the reasoning of the earlier state-court decision using record evidence it never had. That is the absurd end of the road for the parties' position on *Ylst*, and among the reasons *six* active judges on the Ninth Circuit would have hewn to the line Judge Reinhardt earlier drew in *Johnson* and applied *Richter* to the California Supreme Court's unexplained adjudication on the merits. *See Cannedy v. Adams*, 733 F.3d 794, [23] 801-802 (9th Cir. 2013) (O'Scannlain, J., joined by Tallman, Bybee, Callahan, Bea, and Ikuta, J.J., dissenting from denial of rehearing *en banc*).[6]

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[6] None of this Court's sister circuit's decisions that petitioner cites are distinctly reasoned enough to merit detailed discussion here. Several appear to make broad pronouncements about *Ylst* while themselves dealing with cases of discretionary denials of review like *Brumfield*, betraying the same confusion that pervades the parties' briefs. *See, e.g.*, *Woodfox v. Cain*, 772 F.3d 358, 366-74 (5th Cir. 2014) (purporting to "look through" what again appear to be discretionary denials of Louisiana "supervisory writs"). One case deals with a procedural default issue (pure *Ylst*) and has nothing to do with this case because a finding of procedural default is not an adjudication on the merits. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 339-40 (6th Cir. 2012). In another it appears the state supreme court expressly adopted the reasoning of the lower state court, also a different case entirely. *See Blystone v. Horn*, 664 F.3d 397, 417 n.15 (3d Cir. 2011). And lest this Court be swayed by those other Circuits that have actually discussed the issue in depth (the Ninth and Seventh), they disagree with this Court's panel decisions by the vote of precisely *one* active judge in each circuit. *See Cannedy*, 706 F.3d at 1151 (opinion by Graber, J.,

CONCLUSION

This Court should answer its *en banc* question in the negative. Consistent with this Court's order of appointment, *amicus* counsel expresses no views on whether petitioner is entitled to relief on the merits.

[24] Dated:
October 9, 2015

Respectfully Submitted,

s/ Adam K. Mortara

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Court-Appointed *Amicus Curiae*

[Certificate Of Compliance With Rule 32(A) Omitted]

[Certificate Of Service Omitted]

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joined by Lucero, J. of the Tenth Circuit, with dissenting opinion from Kleinfeld, J.); *Wooley v. Rednour*, 702 F.3d 411 (7th Cir. 2012) (opinion by Williams, J. and joined by Conley, D.J., decided by a quorum due to the death of an original panel member).

[SEAL]

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October 16, 2015

Amy Nerenberg, Acting Clerk of Court
Eleventh Circuit Court of Appeals
56 Forsyth Street, N.E.
Atlanta, Georgia 30303

RE: Marion Wilson, Jr. v. Warden,
Case No. 14-10681 Supplemental Authority

Dear Ms. Nerenberg:

Pursuant to FRAP 28(j), this letter is to cite supplemental authority in the above-styled case. In addition, Respondent requests a word extension of 2,514 for this supplemental authority. Should this letter be construed as a supplemental letter brief, Respondent respectfully requests leave of court to file this supplemental letter brief.

The amicus asserts that whether or not the "look through" doctrine of *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) applies turns on whether the review of the last state court to have considered the case conducted a discretionary review or reviewed the case on the merits.

Before citing to supplemental authorities, it should be noted that *Ylst* did not turn on this distinction. The Court in *Ylst* looked through one denial of discretionary review and four silent denials, which were decisions on the merits – counting backwards: the fifth opinion was the discretionary denial of review by the California Supreme Court following the direct appeal to the California Court of Appeal, which the Supreme Court deemed not a "judgment"; the fourth silent opinion was from a "petition for collateral relief in California Superior"; the third silent opinion was from "a similar petition for relief in the California Court of Appeal, invoking that court's original jurisdiction"; the second silent opinion was from "a petition for habeas corpus in the California Supreme Court, invoking the original jurisdiction of that tribunal"; and the first silent opinion was from a "second petition for habeas relief in the California Supreme Court, again invoking that court's original jurisdiction." *Ylst*, 501 U.S. at 799-801, 805-806.[1] Thus, the first decision the Court looked through in *Ylst* was the summary denial of the California Supreme Court filed under the court's original jurisdiction, which was the same decision to which the United States Supreme Court gave deference in *Harrington v. Richter*, 562 U.S. 86 (2011).

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[1] The amicus attempts to limit the decision in *Ylst* to the issue of only looking through to see if a procedural bar is in place, but the only circuit to employ this narrow reading is the Fourth Circuit. *See Tice v. Johnson*, 647 F.3d 87, 106 (4th Cir. 2011).

Contrary to the implications by the amicus, the Supreme Court did not state in either *Johnson v. Williams*, 133 S. Ct. 1088 (2013) or *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) that it was only looking through because the last state court decision was the denial of a discretionary appeal. Indeed in both, the Court clearly stated they were looking through because the last state court decisions were "summary denials." *See Johnson*, 133 S. Ct. at 1094, fn. 1; *Brumfield*, 135 S. Ct. at 2276. Although *Richter* states summary denials are considered a decision on the merits, the procedural posture of *Richter* is an anomaly, not because it concerned an original writ to the California Supreme Court, which was also the action looked through in *Ylst*, but because there was no reasoned opinion by any state court.

Respondent is not stating there is no support for the amicus's position; it is simply not as clear-cut as he emphatically announces it to be. There is ample support for the parties' position that that [sic] the underlying principle of *Ylst*, one that has been employed by countless courts, including this Court, and given by Justice Ginsberg in her concurrence in *Hittson v. Chatman*, 135 S. Ct. 2126 (2015), that summary denials, regardless of whether discretionary or not, of a higher state appellate court do not divest a lower state court's reasoned opinion of deference under the AEDPA, when that opinion by a lower state court has not been overturned. [sic] *See Etherton v. Rivard*, 2015 U.S. App. LEXIS 15570, 16-18 (6th Cir. 2015) ("Where the short orders of appellate courts 'are ambiguous as to whether they

refer to procedural default or denial of relief on the merits,' we must 'look to the last reasoned state court opinion to determine the basis for the state court's rejection of [a petitioner's] claim.'"); *Sanchez v. Roden*, 753 F.3d 279, 299 (1st Cir. 2014); *Hairston v. Hendricks*, 578 Fed. Appx. 122, 126 (3d Cir. 2014); *Collins v. Sec'y of the Pa. Dep't of Corr.*, 742 F.3d 528, 546 (3d Cir. 2014); *Woodfox v. Cain*, 772 F.3d 358, 369 (5th Cir. 2014) (looked through an original writ filed in the Louisiana Supreme Court); *Loza v. Mitchell*, 766 F.3d 466, 473 (6th Cir. 2014) ("We review the decision of the last state court to issue a reasoned opinion on the issues raised in a habeas petition."); *Cannedy v. Adams*, 706 F.3d 1148, 1157-1159 (9th Cir. 2013); *McElvaney v. Pollard*, 735 F.3d 528, 531, 532 (7th Cir. 2013) ("' When a state collateral review system issues multiple decisions, we typically consider the last reasoned opinion on the claim' – here the opinion of the Wisconsin Court of Appeals."); *Worthington v. Roper*, 631 F.3d 487, 497 (8th Cir. 2011) ("Indeed, other courts likewise have employed AEDPA to review the merits of lower court decisions in the absence of a reasoned affirmance by a state's highest court."); *Mark v. Ault*, 498 F.3d 775, 783 (8th Cir. 2007) ("Because the Iowa Supreme Court denied Mark review, we apply the AEDPA standard to the decision of the Iowa Court of Appeals because it is the 'last reasoned decision' of the state courts.").

The amicus states that federalism is "insult[ed]" by the parties' answer to the Court's question that it should "look through" to the last reasoned state court opinion. This is untrue and the position of the amicus

fails to take into account the state habeas process in Georgia and the history of O.C.G.A. § 9-14-52, the statute governing appeals from state habeas actions. Instead the amicus relies upon Georgia Supreme Court Rule 36 and a finding of finality by the United States Supreme Court of the Georgia Supreme Court's denial of an application of probable cause, ("CPC"). The amicus ignores the actual practice of law in Georgia. In a capital state habeas proceeding, the parties spend years in discovery, conduct an evidentiary hearing during which an extensive record of evidence is created, and thoroughly brief the issues to the state habeas court. O.C.G.A. § 9-14-49 expressly requires habeas courts to "make written findings of fact and conclusions of law upon which the judgment is based" and if the court fails to do so, "the case must be vacated and remanded with instruction to the habeas court to enter a new order that complies with OCGA § 9-14-49." *Thomas v. State*, 284 Ga. 327, 328 (2008). These opinions can take years after briefing before they are issued and are, most often, quite lengthy in capital cases.

Prior to the 1975 Habeas Corpus Act, should a petitioner be denied relief in state habeas, he could directly appeal to the Georgia Supreme Court. *See Reed v. Hopper*, 235 Ga. 298 (1975). The legislature changed this process and made the appeal discretionary. *Id.* The statute governing the appeal from the denial of state habeas relief is currently O.C.G.A. § 9-14-52. As stated by the Georgia Supreme Court, "O.C.G.A. § 9-14-52 requires this Court to engage in a discretionary review process concerning an appeal from the habeas court's

denial of relief to a prisoner held under sentence of a state court of record, thereby making unauthorized a direct appeal from the denial of a post-trial habeas petition." *Smith v. Nichols*, 270 Ga. 550, 552 (1999). Although Georgia Supreme Court Rule 36 states "A certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued where there is arguable merit" the use of the two words, "arguable merit" in this rule does not remove the appeal from discretionary status. As stated by O.C.G.A. § 15-2-17 "The Supreme Court shall have full power and authority to make all rules, **not in conflict with the Constitution or laws of this state**." (Emphasis added). With very few exceptions, the denial of an application for probable cause to appeal from a state habeas proceeding is a one sentence summary denial. It would beg credulity to find that in the thousands of applications denied by the Georgia Supreme Court, both death and non-death, for the past forty years, the court was overruling every procedural default determination by a state habeas court and finding the claim should be denied on the merits.

The amicus also argues that, in addition to this Court's decision in *Newland v. Hall*, 527 F.3d 1162 (11th 2008), the United States Supreme Court's statement in *Sears v. Upton*, 561 U.S. 945 (2010), labeling the Georgia Supreme Court's denial of an application a "final judgment" for purposes of invoking the Supreme Court's jurisdiction under 28 USCS § 1257, is synonymous with "final merits" as contemplated by 28

USCS § 2254.[2] Finality for purposes of invoking the Supreme Court's jurisdiction under § 1257 does not turn on whether there is a final merits determination. Finality was defined by the Supreme Court many decades ago:

> Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, § 237, 28 U. S. C. § 344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Market St. R. Co. v. Railroad Comm'n of California, 324 U.S. 548, 551 (1945). *See also Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). A decision could be final for purposes of § 1257 without having even reached the merits of a decision. *See Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-558 (1963) (finding a judgment final for purposes of the Court's jurisdiction even though the judgment was "a separate and independent matter, anterior to the merits and not enmeshed in the

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[2] Indeed when a petitioner files a petition for writ of certiorari from the denial of CPC to the United States Supreme Court, neither party argues that procedurally defaulted claims are suddenly denied on the merits. Additionally, as can be seen in the briefs in *Sears* to the United States Supreme Court, the parties argued about the findings of the state habeas court, not the summary denial of CPC by the Georgia Supreme Court. *See Sears v. Upton*, 2009 U.S. Briefs 8854 (2010).

factual and legal issues comprising the plaintiffs cause of action"); *Rosenblatt v. Am. Cyanamid Co.*, 86 S. Ct. 1 (U.S. 1965) (finding a final judgment despite there having been "no trial of this case on the merits"). This point of distinction does little to help this Court to decide its current issue, but is made to show the general over-reaching nature of the amicus's brief.

The amicus also argues that new facts and law could be presented and considered by the Georgia Supreme Court in issuing its summary denial of the discretionary appeal. With regard to new facts, this could never be. The Georgia Supreme Court is a court of error correction and clearly does not consider new facts not presented to the lower court.[3] *See Brown v. Fokes Props. 2002, Inc.*, 283 Ga. 231, 232 (2008) ("Likewise, the exhibit attached to Brown's "'appellate brief but not appearing in the record transmitted by the trial court cannot be considered by this court and afford[s] no basis for reversal.'"); *see also State v. White*, 282 Ga. 859 (2008) ("the trial court did not consider the attachments that were appended to the State's motion for reconsideration. Thus, this Court cannot consider that material"); *see also Givens v. Ichauway,* Inc., 268 Ga. 710, 712-713 (1997) (appellate courts will review only evidence presented to trial court before its ruling on motion for summary judgment). The record closes

[3] The amicus argues that the parties' position runs afoul of *Cullen v. Pinholster*, 563 U.S. 170 (2011). This is in error. *Cullen* concerns the presentation of facts not presented to the state court, and, as new facts cannot be presented to the Georgia Supreme Court, looking through to the last reasoned opinion of the state habeas court would not be in contravention of *Cullen*.

when the petitioner files his notice of appeal in the Georgia Supreme Court and new facts are not considered on appeal.

As for the amicus's argument that new law could be promulgated by the United States Supreme Court between the decision of the state habeas court and the summary denial of an application by the Georgia Supreme Court, which could lead to the absurdity of judging the state habeas court's decision based upon law that did not exist, this argument fails to take into account the actual practice of law. If new law is announced upon which a petitioner has not made a claim, he would have to file a successive state habeas petition as there would be no decision upon which the Georgia Supreme Court could rule. As stated by the Georgia Supreme Court:

> "our appellate courts are courts for the correction of errors of law committed in the trial court. Routinely, this Court refuses to review issues not raised in the trial court. "'To consider the case on a completely different basis from that presented below . . . would be contrary to the line of cases . . . holding, "He must stand or fall upon the position taken in the trial court."'" Fairness to the trial court and to the parties demands that legal issues be asserted in the trial court. (Footnotes omitted.)"

Barnes v. Turner, 278 Ga. 788, 795 (2004) (quoting *Pfeiffer v. Ga. Dept. of Transp.*, 275 Ga. 827, 829 (2002)); *see also City of Gainesville v. Dodd*, 275 Ga. 834, 837-838 (2002) ("the trial court has not ruled on the

grounds the City advances, there is no ruling to be reviewed on appeal, and the Court of Appeals cannot address an issue that is not enumerated as an error"). If the new law applied to a claim that had been raised by a petitioner, which was also raised in his application,[4] then either the Georgia Supreme Court could remand the case for further consideration or the court could grant the application to consider the claim. The amicus fails to point to cases decided by this Court for the past near two decades, during which this Court has routinely looked through to the state habeas court's decision, in which this absurdity has come to pass.

The amicus's position played out to its logical conclusion could result in clearly erroneous decisions. Take this example, a claim is raised on direct appeal and the Georgia Supreme Court issues a reasoned opinion and denies it on the merits. That same claim is then raised in a state habeas proceeding with no new facts or law and the state habeas court properly determines that it is barred from reviewing this claim under the doctrine of res judicata. The petitioner then raises this same claim on application to the Georgia Supreme Court and the court summarily denies the application. Under the amicus's position, only this last summary denial of the application is the decision which receives

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[4] Petitioners in capital cases do not raise every claim from a state habeas petition on application to the Georgia Supreme Court. Until this Court's decision in *Hittson v. Chatman*, 759 F.3d 1210, 1233, fn. 25 (11th Cir. 2014), it had never been the precedent of this Court to find claims not raised in CPC applications to be unexhausted in Georgia.

deference under the AEDPA instead of the reasoned opinion of the Georgia Supreme Court.

Contrary to the amicus's statement that Respondent's brief on this issue is "unthoughtful," counsel for Respondent had thoroughly researched, considered and discussed this issue with other experts in this field. And Respondent admits that arguments could be made for both answers to the Court's question. But the answer that seems the best course of action, when the law and the practice of law in Georgia are considered, is to look through. Nothing in the opinions of *Brumfield, Johnson, Richter* or the other decisions in which the Supreme Court has looked through without mentioning looking through, unequivocally states that the "look through" doctrine can only be applied to discretionary appeals. In addition, Respondent does not see evidence that Justice Ginsberg's concurrence in *Hittson v. Chatman* was delivered in "haste" as suggested by the amicus as the Supreme Court requested the record and re-conferenced the petition five times. As such, Respondent is unwilling to discard so lightly an opinion, albeit one of dicta, issued by a Supreme Court justice, as done by the amicus. Part of the purpose of the AEDPA is to promote comity, it is difficult to see how that is accomplished by refusing to give deference to the last reasoned opinion of a state court based upon the premise that a later, unexplained, summary denial of a discretionary appeal represents the sum total of the state findings of facts and conclusions of law on a capital state habeas petition containing

dozens of claims with tens of thousands of pages of record. Inevitably, the balance of law and practice favor looking through to the last reasoned opinion of the state courts.

Sincerely,

/s/ Sabrona D. Graham
Sabrina D. Graham
Counsel for Appellee

cc: David J. Harth
Mark E. Olive
Brian Kammer
Adam K. Mortara

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10681

D.C. Docket No. 5:10-cv-00489-MTT

MARION WILSON, JR.,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(August 23, 2016)

Before ED CARNES, Chief Judge, TJOFLAT, HULL, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JULIE CARNES, and JILL PRYOR, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

This appeal requires us to decide whether, when a federal court reviews a state prisoner's petition for a writ of habeas corpus, it must "look through" a

summary decision on the merits by a state appellate court to review the last reasoned decision. Marion Wilson, Jr., a Georgia prisoner sentenced to death for the murder of Donovan Parks in 1996, filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. That court denied his petition in a written opinion. Wilson sought to appeal that decision, and the Supreme Court of Georgia summarily denied his application for a certificate of probable cause to appeal. The district court then denied Wilson's federal petition for a writ of habeas corpus, and after reviewing the one-sentence decision of the Georgia Supreme Court, we affirmed. *Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671, 681 (11th Cir. 2014), *reh'g en banc granted, op. vacated*, No. 14-10681 (11th Cir. July 30, 2015).

We vacated our panel opinion to determine en banc whether federal courts must "look through" the summary denial by the Supreme Court of Georgia and review the reasoning of the Superior Court of Butts County. We conclude that federal courts need not "look through" a summary decision on the merits to review the reasoning of the lower state court. We remand to the panel all outstanding issues in this appeal.

I. BACKGROUND

In 1996, Marion Wilson, Jr., and Robert Earl Butts killed Donovan Parks in Milledgeville, Georgia. *Wilson v. State*, 525 S.E.2d 339, 343 (Ga. 1999). The two men approached Parks in the parking lot of a Wal-Mart

store and asked him for a ride. Minutes later, Parks's body was found on a nearby residential street.

Officers arrested Wilson. They searched Wilson's residence and found a "sawed-off shotgun loaded with the type of ammunition used to kill Parks." *Id.* Wilson told the officers that Butts had shot Parks with a sawed-off shotgun. A jury convicted Wilson of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. *Id.* at 342-43. At sentencing, trial counsel argued that Wilson was not the triggerman and presented evidence of his difficult childhood. Georgia presented evidence of Wilson's extensive criminal history and gang activity. The trial court sentenced Wilson to death, and the Supreme Court of Georgia affirmed his convictions and sentence on direct appeal. *Id.* at 343.

Wilson filed a state petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, in which he argued that his trial counsel rendered ineffective assistance in his investigation of mitigation evidence for the penalty phase of Wilson's trial. At an evidentiary hearing, Wilson introduced lay testimony that he argued should have been used as evidence of his difficult childhood. He also introduced expert testimony that he argued could have explained his poor judgment skills.

The superior court denied Wilson's petition in a written order. It examined the lay testimony and found

it largely cumulative of other evidence at trial or inadmissible on evidentiary grounds. It found that the expert testimony would not have changed the outcome of the trial. For these reasons, it ruled that trial counsel's performance was not deficient and, alternatively, that Wilson suffered no prejudice. Wilson filed an application for a certificate of probable cause to appeal, which the Georgia Supreme Court summarily denied in a one-sentence order.

Wilson then filed a federal petition for a writ of habeas corpus, and the district court denied him relief. It ruled that the state trial court reasonably applied clearly established federal law. But the district court granted Wilson a certificate of appealability on the issue of the effectiveness of his trial counsel at sentencing.

A panel of this Court affirmed. *Wilson*, 774 F.3d at 681. As an initial matter, the panel reasoned that "the one-line decision of the Supreme Court of Georgia denying Wilson's certificate of probable cause is the relevant state-court decision for our review because it is the final decision 'on the merits.'" *Id.* at 678 (quoting *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008)). Under the test announced in *Harrington v. Richter*, 562 U.S. 86 (2011), the panel asked "whether there was any 'reasonable basis for the [Supreme Court of Georgia] to deny relief.'" *Wilson*, 774 F.3d at 678 (alteration in original) (quoting *Richter*, 562 U.S. at 98). The panel concluded that the Supreme Court of Georgia "could have looked at the overall mix of evidence, aggravating

and mitigating, old and new, and reasonably determined that a jury would have still sentenced Wilson to death." *Id.* at 680. The panel stated that the lay testimony "presented a 'double-edged sword,'" *id.* at 679 (quoting *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1324 (11th Cir. 2013)), and was "largely cumulative" of evidence presented to the jury, *id.* (quoting *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1260-61 (11th Cir. 2012)). The panel stated that the Georgia Supreme Court could have found the new expert testimony to be unreliable and in conflict with other evidence. *Id.* at 680. For these reasons, the panel concluded that the decision of the Supreme Court of Georgia denying Wilson's petition was neither "contrary to, [nor] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at 681 (quoting 28 U.S.C. § 2254(d)(1)).

In his petition for rehearing en banc, Wilson argued that the panel erred when it reviewed the summary denial of his petition for a certificate of probable cause to appeal. Wilson argued that, under the decision in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the panel should have instead examined the last reasoned decision by a state court. We ordered Georgia to respond to the petition.

In its response to Wilson's petition, Georgia argued that a court should "look through a summary denial to a reasoned decision only to determine whether the state appellate court affirmed on procedural grounds or on the merits." Georgia defended the panel decision

that, under *Richter*, a federal court must defer to the summary denial of the Georgia Supreme Court by asking "what argument or theories could have supported the affirmance." Georgia urged this Court to deny Wilson's petition.

On July 30, 2015, we vacated the panel opinion and granted Wilson's petition for rehearing en banc. We directed the parties to brief the following issue: "Is a federal habeas court required to look through a state appellate court's summary decision that is an adjudication on the merits to the reasoning in a lower court decision when deciding whether the state appellate court's decision is entitled to deference under 28 U.S.C. § 2254(d)?"

Georgia then changed its position. In its en banc brief, Georgia argued that this Court should review the reasoned opinion of the superior court, not the summary denial by the Georgia Supreme Court.

To provide the Court with argument on both sides of the question, we appointed Adam Mortara as *amicus curiae* to argue that the question should be answered in the negative. We thank Mr. Mortara for his service to this Court on short notice and for his superb brief and oral argument in keeping with the highest tradition of the legal profession.

Wilson and Georgia also challenged our precedent that the denial of a certificate of probable cause by the Georgia Supreme Court is an adjudication on the merits for the purposes of section 2254(d). *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1231-32 (11th Cir. 2014).

Because the answer to this preliminary question could make it unnecessary to decide the question we agreed to review, we ordered Wilson and Georgia to file supplemental briefs addressing whether the denial of an application for a certificate of probable cause by the Georgia Supreme Court is an adjudication on the merits.

II. DISCUSSION

We divide our discussion in two parts. First, we discuss why the denial of a certificate of probable cause by the Georgia Supreme Court is an adjudication on the merits. Second, we explain why a federal court is not required to "look through" a summary decision of a state appellate court that is an adjudication on the merits to the reasoning in a lower court decision.

A. The Denial of a Certificate of Probable Cause by the Georgia Supreme Court Is an Adjudication on the Merits.

The Antiterrorism and Effective Death Penalty Act of 1996 requires a federal court to deny an application for a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). When

deciding that issue, we review one decision: "the last state-court adjudication on the merits." *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011). The Supreme Court made this point clear in *Greene v. Fisher*, when it held that the "clearly established Federal law" to be applied is the law at the time of "the last state-court adjudication on the merits." *Id.* Reading the text of section 2254(d), the Supreme Court explained, "The words 'the adjudication' in the 'unless' clause obviously refer back to the 'adjudicat[ion] on the merits,' and the phrase 'resulted in a decision' in the 'unless' clause obviously refers to the decision produced *by that same adjudication on the merits*." *Id.* (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)).

When, as here, the Georgia Supreme Court summarily denies a certificate of probable cause to appeal after a superior court has denied habeas relief on the merits, the summary denial is an adjudication on the merits. In Georgia, a petitioner must seek a certificate of probable cause from the Georgia Supreme Court before he can appeal a denial of habeas relief. Ga. Code Ann. § 9-14-52(a). Georgia Supreme Court Rule 36 states that, "[a] certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued *where there is arguable merit*, provided there has been compliance with [Ga. Code Ann.] § 9-14-52(b)." Ga. Sup. Ct. R. 36 (emphasis added). Under this rule, the Georgia Supreme Court reviews the merits of the appeal: that is, the Georgia Supreme Court denies a properly filed application for a certificate of probable cause only when it

determines that the appeal lacks "arguable merit." *See Foster v. Chatman*, 136 S. Ct. 1737, 1746 n.2 (2016). For this reason, the Supreme Court of the United States recently determined that a summary denial of a certificate of probable cause is a "decision on the merits" subject to its review on a writ of certiorari. *Id.* For the same reason, the denial of a certificate of probable cause is an adjudication on the merits under section 2254.

The Georgia Supreme Court does not avoid adjudicating a habeas appeal by requiring the petitioner to seek a certificate of probable cause. The Georgia Constitution vests the state supreme court with appellate jurisdiction over "[a]ll habeas corpus cases." Ga. Const. Art. VI, § VI, ¶ III. In *Reed v. Hopper*, 219 S.E.2d 409 (Ga. 1975), the Georgia Supreme Court held that the 1975 Habeas Corpus Act, which created the process for a certificate of probable cause to appeal, satisfied the constitutional mandate of exercising appellate jurisdiction where the Georgia Supreme Court "may refuse to entertain a habeas corpus appeal for lack of probable cause." *Id.* at 411. The Georgia Supreme Court still passes on the merits of every petition by either immediately ruling that an appeal lacks arguable merit or by granting the certificate, conducting further review, and *then* ruling on the merits. Georgia asserts that many denials of an application for a certificate of probable cause are summary dispositions and that, when the Georgia Supreme Court reviews a petitioner's claims after granting a certificate of probable cause, the review is typically more comprehensive. But

section 2254 does not require state courts to provide written opinions, *Richter*, 562 U.S. at 98, and it does not set a thoroughness standard, *see Johnson v. Williams*, 133 S. Ct. 1088, 1095-96 (2013). That the Georgia Supreme Court may choose to conduct a more probing review of appeals after granting a certificate of probable cause does not mean that a denial of a certificate of probable cause is not also on the merits. Indeed, in a recent summary denial of an application for a certificate of probable cause, the Georgia Supreme Court stated that it "fully considered [the petitioner's] application on the merits" and denied the application "as lacking arguable merit." *Lucas v. Chatman*, No. 516W1408 (Ga. Apr. 27, 2016). For every application for a certificate of probable cause, the Georgia Supreme Court must satisfy itself that the petitioner's claims are either procedurally defaulted or meritless.

And, in fact, the Georgia Supreme Court thoroughly reviews the evidence and the petitioner's arguments before denying an application for a certificate of probable cause. The Georgia Supreme Court makes its decision with the aid of the complete record and transcript, which the clerk of the superior court is required to transfer to the clerk of the Supreme Court. *See* Ga. Code Ann. § 9-14-52(b). Although the Georgia Supreme Court frequently denies an application summarily, it sometimes writes lengthy opinions to explain why a prisoner's claims are without merit. *See, e.g.*, *Gibson v. Turpin*, 513 S.E.2d 186, 187 (Ga. 1999) (denying prisoner's application for a certificate of probable cause in a twelve-page decision over a dissent because, among

other reasons, his attorney's representation was not deficient). On numerous occasions, Justice Carley has dissented from a summary denial of a certificate of probable cause on the ground that the Georgia Supreme Court should not have "dispose[d] of the case on the merits" because the prisoner did not comply with the procedural requirements for seeking a certificate of probable cause. *Alderman v. Head*, 559 S.E.2d 72, 72 (Ga. 2002) (Carley, J., dissenting); *see also, e.g.*, *Colton v. Morgan*, 514 S.E.2d 822, 822 (Ga. 1999) (Carley, J., dissenting); *Hamm v. Johnson*, 514 S.E.2d 822, 822 (Ga. 1999) (Carley, J., dissenting); *Ferguson v. Hall*, 512 S.E.2d. 604, 604 (Ga. 1999) (Carley, J., dissenting). The Georgia Supreme Court clearly understands that a summary denial of a certificate of probable cause is a determination that a prisoner's claims lack merit. To contend that the denial is not an adjudication on the merits is to suggest that the elaborate procedures of the Georgia courts are a sham. We refuse to endorse that suggestion.

The courts of last resort in many other states provide a discretionary appeals process similar to certiorari review. For example, in granting or denying a writ, the Louisiana Supreme Court exercises its "sound judicial discretion" and considers a number of nonexhaustive factors including whether the appeal presents "a significant issue of law which has not been . . . resolved," the decision of the court of appeal "will cause material injustice or significantly affect the public interest," or "the controlling precedents should be overruled or substantially modified." La. Sup. Ct. R. 10(a).

The rules in Illinois and Pennsylvania also provide for review in the "sound judicial discretion" of the court, Ill. Sup. Ct. R. 315(a); Pa. R. App. P. 1114(a), and the rules in Massachusetts provide for review when it is in "the public interest" or "the interests of justice," Mass. R. App. P. 27.1(e). These courts decide whether to review an appeal based, at least in part, on considerations other than the merits of the appeal. Unlike the Georgia Supreme Court, these state supreme courts may deny an application to appeal a denial of collateral relief without determining that the appeal lacks merit and, as a result, these denials are not adjudications on the merits.

Georgia courts and practitioners sometimes refer to the process by which a certificate of probable cause is reviewed as "discretionary," but they mean something different from traditional certiorari review. Black's Law Dictionary defines "discretionary review" as "[t]he form of appellate review that is not a matter of right but that occurs only with the appellate court's permission." *Review*, Black's Law Dictionary (10th ed. 2014). Georgia courts and practitioners use the term "discretionary" to distinguish appeals requiring permission from appeals as of right, not to describe a certiorari-type procedure. For example, a well-reputed treatise of Georgia appellate practice notes that an application for leave to appeal a final judgment under section 5-6-35 of the Georgia Code – which cannot be denied when there is "[r]eversible error," Ga. Sup. Ct. R. 34 – "is widely referred to as 'discretionary review.'" Christopher J. McFadden et al., Ga. Appellate Practice

with Forms § 13:1 (2015-16 ed. 2015). "[B]ut practitioners should not be led astray by the term. As understood by both appellate courts, there is no discretion to deny an application for 'discretionary review' when reversible error appears to exist." *Id.* (citing *Nw. Soc. & Civic Club, Inc. v. Franklin*, 583 S.E.2d 858 (Ga. 2003)). The authors anticipated that the term "discretionary review" may cause confusion and clarified that in Georgia "discretionary review" may still require an adjudication on the merits. The denial of an application for a certificate of probable cause is both discretionary, as the term is understood in Georgia law, and an "adjudicat[ion] on the merits" under section 2254.

In its supplemental brief, Georgia expressed concern that if a denial of a certificate of probable cause is an adjudication on the merits, a silent denial of a certificate of probable cause may eradicate a procedural bar relied on by a state court below, but *Ylst* prevents that result. The Supreme Court of the United States held in *Ylst* that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment . . . rest upon the same ground." *Ylst*, 501 U.S. at 803. If "the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.* A summary denial of a certificate of probable cause is not on the merits for any claim that was procedurally barred below. Georgia's concern is unfounded.

The superior court denied Wilson's claims only on the merits. The summary denial of Wilson's application for a certificate of probable cause by the Georgia Supreme Court is the final state court adjudication on the merits. We must review that latter decision.

B. Federal Courts Need Not "Look Through" a Summary Decision on the Merits to Review the Reasoning of the Lower State Court.

The deferential standard of section 2254(d) applies regardless of whether the state court decision "is unaccompanied by an opinion explaining the reasons relief has been denied." *Richter*, 562 U.S. at 98. When the last adjudication on the merits provides a reasoned opinion, federal courts evaluate the opinion. 28 U.S.C. 2254(d); *see, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 42-44 (2009). When the last adjudication on the merits provides no reasoned opinion, federal courts review that decision using the test announced in *Richter*. In *Richter*, an inmate filed a petition for a writ of habeas corpus in the California Supreme Court, which summarily denied the petition. *Richter*, 562 U.S. at 96. When the inmate filed a federal petition for a writ of habeas corpus, the Supreme Court of the United States ruled that, "[w]here a state court's decision is unaccompanied by an explanation," a petitioner's burden under section 2254(d) is to "show[] there was no reasonable basis for the state court to deny relief." *Id.* at 98. "[A] habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it

is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." *Id.* at 102. Under that test, Wilson must establish that there was no reasonable basis for the Georgia Supreme Court to deny his certificate of probable cause.

Wilson argues that *Richter* applies only when there is no reasoned decision from any state court. He argues that, when a previous state adjudication offered a reasoned opinion, *Ylst* requires federal courts to "look through" the summary denial and review that previous opinion under the standard outlined in section 2254. We disagree.

Nothing in the Act or *Richter* suggests that its reasoning is limited to the narrow subset of habeas petitions where there is no reasoned decision from any state court. Under section 2254(d), a federal court reviewing the judgment of a state court must first identify the last adjudication on the merits. It does not matter whether that adjudication provided a reasoned opinion because section 2254(d) "refers only to a 'decision" and does not "requir[e] a statement of reasons." *Id.* at 98. The federal court then must review that decision deferentially. In *Richter*, the Supreme Court explained how to review a decision "unaccompanied by an opinion." *Id.* There is no basis in the Act or *Richter* for two divergent analytical modes – one when there is no previous reasoned decision below and another for when there is.

Ylst involved the application of the doctrine of procedural default – a judge-made doctrine, *see McQuiggin v. Perkins*, 133 S. Ct. 1924, 1937 (2013) (Scalia, J., dissenting) – in the review of state-court judgments that do not clearly state whether they rest on procedural grounds or adjudicate the merits of a federal claim. *See Ylst*, 501 U.S. at 802. Under the doctrine of procedural default, federal courts do not review the merits of a state prisoner's federal claim if "a state-law default prevent[ed] the state court from reaching the merits." *Id.* at 801; *see also Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977). In *Ylst*, an inmate in a California prison appealed his conviction for murder on the ground that the state introduced evidence obtained in violation of the Fifth and Fourteenth Amendments. 501 U.S. at 799. The California appellate court ruled that the inmate procedurally defaulted his federal claim because he raised it for the first time on appeal. *Id.* When the inmate filed a petition for collateral relief in state court, the trial court and appellate courts summarily denied relief. *Id.* at 800. The inmate then filed a federal petition for a writ of habeas corpus, and the district court ruled that the "state procedural default barred federal review." *Id.* The Supreme Court of the United States held that, where "the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.* at 803. And if the last reasoned opinion of a state court adjudicated a federal claim,

federal courts should presume that the later state decision affirming without explanation also adjudicated the merits of that claim. *Id.*

It makes sense to assume that a summary affirmance rests on the same *general* ground – that is, a procedural ground or on the merits – as the judgment under review. As the *Ylst* Court explained, it is "most improbable" that an "unexplained order leaving in effect a decision . . . that expressly relies upon procedural bar" actually "reject[ed] that bar and decid[ed] the federal question." *Id.* at 803-04. But it does not follow that a summary affirmance rests on the same *specific* reasons provided by the lower court.

The Supreme Court of the United States after all does not adopt the reasoning of a lower court when it issues a summary disposition. When the Court vacated the judgement of a three-judge district court after the district court erroneously interpreted a summary affirmance by the Supreme Court, Chief Justice Burger explained in a concurring opinion, "When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached." *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). In *Mandel v. Bradley*, 432 U.S. 173 (1977), the Court quoted Chief Justice Burger approvingly and reiterated that "[b]ecause a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." *Id.* at 176. Since then, the Supreme Court has repeatedly confirmed this explanation of its summary

affirmances. *See, e.g.*, *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 n.14 (1998) ("A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983))); *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 224 n.2 (1992) ("[O]ur summary disposition affirmed only the *judgment* below, and cannot be taken as adopting the reasoning of the lower court"); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 n.24 (1983) ("[A]s with all summary affirmances, our action 'is not to be read as an adoption of the reasoning supporting the judgment under review.'" (quoting *Zobel v. Williams*, 457 U.S. 55, 64 n.13 (1982))). And this Court has interpreted a summary affirmance by our predecessor circuit as "only approv[ing] the result reached in the district court without expressly approving the opinion or adopting its reasons." *DeShong v. Seaboard Coast Line R.R. Co.*, 737 F.2d 1520, 1523 (11th Cir. 1984). It makes no sense, and would run counter to principles of federalism and comity, to constrain state courts in their use of summary affirmances in a way that we do not constrain ourselves.

An appellate court might affirm because it agrees with the disposition of a claim for a different reason. This Court frequently affirms "on any ground supported by the record[,] even if that ground was not considered by the district court." *Clements v. LSI Title Agency, Inc.*, 779 F.3d 1269, 1273 (11th Cir. 2015)

(alteration in original) (quoting *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 750 F.3d 1238, 1242 (11th Cir. 2014)); *see also United States v. Hall*, 714 F.3d 1270, 1271 (11th Cir. 2013) ("[W]e may affirm for any reason supported by the record, even if not relied upon by the district court." (alteration in original) (quoting *United States v. Chitwood*, 676 F.3d 971, 975 (11th Cir. 2012))). In particular, this Court can affirm the denial of a writ of habeas corpus "for reasons other than those advanced by the district court." *Demps v. Wainwright*, 805 F.2d 1426, 1428 (11th Cir. 1986). Our sister circuits do too. *See, e.g.*, *Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 392 (5th Cir. 2014) ("We are not limited to the district court's reasons for its grant of summary judgment and may affirm the district court's summary judgment on any ground raised below and supported by the record." (quoting *Boyett v. Redland Ins. Co.*, 741 F.3d 604, 606-07 (5th Cir. 2014))); *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012) ("[W]e can affirm . . . on any ground supported by the record, even if the district court did not rely on the ground." (quoting *United States v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011))).

To be sure, the Supreme Court stated in *Ylst* that "silence implies consent," 501 U.S. at 804, but it recited this "maxim" to explain why it is "most improbable" that a court would silently disregard a procedural default. *Id.* We should not apply *Ylst* to a different context that it did not address. *Ylst* creates a rebuttable presumption that state procedural default rulings are not undone by unexplained orders. *See id.* It does not direct

a federal court to treat the reasoning of a decision on the merits by a lower court as the reasoning adopted by a later summary decision that affirms on appeal, especially since neither the Supreme Court nor any federal circuit court operates that way. As Judge O'Scannlain explained, "[i]t makes far more sense to assume that the [state supreme court] adhered to an established practice of summarily denying meritless claims rather than to presume" that the state supreme court "adopted wholesale the reasoning" of a lower court. *Cannedy v. Adams*, 733 F.3d 794, 800-01 (2013) (O'Scannlain, J., dissenting from the denial of rehearing en banc).

Because appellate courts may affirm for different reasons, federal courts should not, under the deferential standard of review established in section 2254, assume that the summary affirmances of state appellate courts adopt the reasoning of the court below. "AEDPA's requirements reflect a 'presumption that state courts know and follow the law.'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). Federal habeas review acts as a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted) (quoting *Lindh v. Murphy*,

521 U.S. 320, 333 n.7 (1997), and *Visciotti*, 537 U.S. at 24). "Adherence to these principles serves important interests of federalism and comity." *Donald*, 135 S. Ct. at 1376. Accordingly, even when the opinion of a lower state court contains flawed reasoning, the Act requires that we give the last state court to adjudicate the prisoner's claim on the merits "the benefit of the doubt," *Renico*, 559 U.S. at 773 (quoting *Visciotti*, 537 U.S. at 24), and presume that it "follow[ed] the law," *Donald*, 135 S. Ct. at 1376 (quoting *Visciotti*, 537 U.S. at 24).

Likewise, the Supreme Court has explained that the doctrine of procedural default in habeas cases "is grounded in concerns of comity and federalism." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). "Without the rule, . . . habeas would offer state prisoners whose custody was supported by independent and adequate state grounds . . . a means to undermine the State's interest in enforcing its laws." *Id.* at 730-31. *Ylst* protected this doctrine by directing federal courts to consider whether a state decision rested on a procedural default in instances where the last state court judgment was a summary order.

Wilson and Georgia would have us ignore these interests of federalism and comity and impose opinion-writing standards on state appellate courts. Under their approach, a state appellate court that adjudicates a prisoner's federal claim on the merits would have to provide a statement of reasons to prevent a federal court, on habeas review, from treating the decision of that state appellate court as a rubberstamp of the opinion below. But the Supreme Court has instructed

us to do otherwise. It has stated, "[W]e have no power [sic] tell state courts how they must write their opinions." *Id.* at 739. And it has since repeated the point: "[F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts." *Williams*, 133 S. Ct. at 1095. And for good reason: requiring state courts to provide rationales would impose a heavy burden. "The caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind." *Id.* at 1095-96 (footnote omitted). "[R]equiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition. The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Richter*, 562 U.S. at 99. This Circuit has explained that "[t]elling state courts when and how to write opinions to accompany their decisions is no way to promote comity." *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1255 (11th Cir. 2013) (alteration in original) (quoting *Wright v. Sec'y, Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002)). Judge Jill Pryor's dissent argues that its approach would not impose opinion-writing standards because the Georgia Supreme Court could issue a one-line order stating that it agreed with the result reached by a lower court but not for the same reasons. But that approach does nothing less than impose an opinion-writing standard. We decline to read *Ylst* and *Richter* in a way that "smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era." *Id.* (quoting *Wright*, 278 F.3d at 1255).

Judge Jill Pryor's dissent argues that the Georgia Supreme Court intends to adopt the opinion of a lower court when it summarily affirms and that we should not assign those summary affirmances the meaning of summary affirmances by federal appellate courts, but we disagree with the dissent's interpretation of Georgia law. Nothing in Georgia law or the practice of the Georgia Supreme Court proves that a summary denial of an application for a certificate of probable cause adopts the reasoning of the superior court. That the Georgia Supreme Court sometimes provides reasons for its denial of an application for a certificate of probable cause when it disagrees with certain reasoning by the superior court does not prove that the Georgia Supreme Court endorses the opinion of the superior court every time it does not write an opinion. It proves only that the Georgia Supreme Court sometimes chooses to provide reasons for a decision. Because we must give state court decisions the "the benefit of the doubt," *Renico*, 559 U.S. at 773 (quoting *Visciotti*, 537 U.S. at 24), we cannot assume that state practice is different from federal practice absent any indication from state law.

When assessing under *Richter* whether there "was no reasonable basis for the state court to deny relief," 562 U.S. at 98, a federal habeas court may look to a previous opinion as one example of a reasonable application of law or determination of fact. For example, in *Gissendaner v. Seaboldt*, 735 F.3d 1311 (11th Cir. 2013), we affirmed the denial of a claim of ineffective assistance of counsel because "the state habeas court's

finding that Gissendaner had failed to demonstrate the requisite prejudice did not involve an unreasonable application of *Strickland* or an unreasonable determination of fact." *Id.* at 1318. When the reasoning of the state trial court was reasonable, there is necessarily at least one reasonable basis on which the state supreme court could have denied relief and our inquiry ends. In this way, federal courts can use previous opinions as evidence that the relevant state court decision under review is reasonable. But the relevant state court decision for federal habeas review remains the last adjudication on the merits, and federal courts are not limited to assessing the reasoning of the lower court.

As amicus argues, under the "look through" approach, federal courts would always attribute the reasoning of a lower court to a state appellate court that summarily affirmed, even in circumstances where it is implausible that the state appellate court adopted that reasoning wholesale. For example, between the date of a lower court decision and the date of a summary affirmance by the state supreme court, the Supreme Court of the United States might issue a decision that changes "clearly established Federal law," 28 U.S.C. § 2254(d). By "looking through" to the lower court decision, the federal court would assume that the state supreme court willfully ignored the intervening change in law, instead of assuming that the state supreme court considered the new law and ultimately reached the same disposition of the claim as the lower court, although for different reasons (such as harmless error). But the Supreme Court has instructed us to

"presum[e] that state courts know and follow the law." *Donald*, 135 S. Ct. at 1376 (quoting *Visciotti*, 537 U.S. at 24).

Wilson argues that in instances where an intervening Supreme Court ruling bears on the case, the *Ylst* presumption would be rebutted, but it would be rebutted by reviewing the state court proceedings in a way that is contrary to the requirements of section 2254. To rebut the presumption, a federal court would presumably consider the opinion of the lower court, the later unexplained order by the state appellate court, and the briefing before that appellate court, *see Ylst*, 501 U.S. at 804, thereby reviewing the entire process by which a prisoner's federal claim was adjudicated. But section 2254 refers to a single adjudication and its resulting "decision." By reviewing one final state court decision, instead of inspecting how different state courts ruled before that final decision, federal courts in habeas review "leave[] primary responsibility with the state courts," *Visciotti*, 537 U.S. at 27.

The Supreme Court has never held that a federal court must "look through" the last adjudication on the merits and examine the specific reasoning used by the lower state court. The phrase "look through" from *Ylst* has come to stand for the routine practice of "looking through" denials of appellate review that are not on the merits to locate the proper state court adjudication on the merits for purposes of section 2254(d). For example, in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), the prisoner filed a state postconviction petition that raised an *Atkins* claim and requested an evidentiary

hearing. *See Atkins v. Virginia*, 536 U.S. 304 (2002). The state trial court dismissed Brumfield's petition and stated that Brumfield "had not demonstrated impairment in adaptive skills." *Brumfield*, 135 S. Ct. at 2289. The Louisiana Supreme Court then "summarily denied his application for a supervisory writ to review the trial court's ruling." *Id.* at 2275. "In conducting the § 2254(d)(2) inquiry," the Supreme Court of the United States "'look[ed] through' the Louisiana Supreme Court's summary denial of Brumfield's petition for review." *Id.* at 2276. Because, as noted above, the denial of a supervisory writ in Louisiana is not on the merits, *see* La. Sup. Ct. R. 10, the Louisiana Supreme Court did not adjudicate Brumfield's claim on the merits when it denied his application. For this reason, the decision of the state trial court was the last state court adjudication on the merits.

Similarly, in *Johnson v. Williams*, the Supreme Court approved the approach of the Ninth Circuit of looking through the California Supreme Court's summary denial of the petition for review. *See* 133 S. Ct. at 1094 n.1. The Ninth Circuit had "look[ed] through" the "state court's decision to deny *discretionary* review" because, unlike the summary denial of an original petition reviewed in *Richter*, it was "decidedly not a decision on the merits." *Williams v. Cavazos*, 646 F.3d 626, 636 (9th Cir. 2011) (emphasis added), *rev'd sub nom. Johnson v. Williams*, 131 S. Ct. 1088; *see* Cal. R. Ct. 8.500(b). For the same reason, the Supreme Court has reviewed decisions from the Michigan Court of Appeals in circumstances where the Michigan Supreme Court

later denied discretionary, certiorari-style review, Mich. Ct. R. 7.305. *See Donald*, 135 S. Ct. at 1375; *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013); *Leer v. Cooper*, 132 S. Ct. 1376, 1383 (2012). In all of these decisions, the Supreme Court did not "look through" the last adjudication on the merits to review the last reasoned opinion of a state court but instead looked through discretionary denials of review to identify the last adjudication on the merits.

Contrary to the dissents' argument, the Supreme Court did not hold in *Premo v. Moore*, 562 U.S. 115 (2011), that a federal court must "look through" a summary decision to review the reasoning used by a lower court. In *Moore*, a state trial court denied Moore's petition for postconviction relief, and the Oregon Court of Appeals affirmed without opinion. *Moore v. Palmateer*, 26 P.3d 191 (Or. Ct. App. 2001) (table). The Supreme Court did not say it looked through the unexplained order, and, in fact, it did not "look through." After describing the decision of the trial court in two sentences, *Moore*, 562 U.S. at 123, the Supreme Court proceeded to discuss why it "would not have been unreasonable" for the state court to conclude, *id.* at 124, 127, 128, or "reasonably could have concluded," *id.* at 131, that Moore was not entitled to relief. The Supreme Court instead appears to have applied *Richter* despite the trial court offering a reasoned opinion. Indeed, Judge Jill Pryor's dissent even admits that the Supreme Court applied the *Richter* test. Judge Jill Pryor's dissent reasons that the Supreme Court applied the *Richter* test because the state court "did not specify," *id.* at

123, on which prong of *Strickland* it ruled, but the Supreme Court never suggested that *Richter* would apply only when a state ruling is unclear. Even if the Supreme Court had looked to the reasons provided by the trial court, it would not establish that a federal court must evaluate only the reasons provided by a lower state court because, as in *Gissendaner*, the Supreme Court concluded that Moore was not entitled to relief. *Id. Moore* neither applied the look-through rule nor implied that we must "look through" in the circumstances we consider here.

Several of our sister circuits have stated that courts must "review the last reasoned state court decision," *Woodfox v. Cain*, 772 F.3d 358, 369 (5th Cir. 2014) (quoting *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012)), but only the Fourth and Ninth Circuits have expressly applied this rule to "look through" an on-the-merits adjudication of a higher state court and then grant habeas relief, *see Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525-27 (4th Cir. 2016); *Cannedy v. Adams*, 706 F.3d 1148, 1158, 1166 (9th Cir. 2013). Other circuit courts have stated this rule but have in fact only "looked through" discretionary denials. *See, e.g., Sanchez v. Roden*, 753 F.3d 279, 298 n.13 (1st Cir. 2014); *Woodfox*, 772 F.3d at 369; *Woolley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012). For example, in *Woolley v. Rednour*, the Seventh Circuit reviewed the written opinion of the Illinois Appellate Court rejecting Woolley's *Strickland* claim after the Supreme Court of Illinois had denied Woolley leave to appeal. 702 F.3d at 421. The Seventh Circuit stated that the ruling of the

Illinois Appellate Court was the "last reasoned opinion" and that the Illinois Supreme Court "presumptively adopt[ed] the reasoning of the state appellate court under *Ylst*." *Id.* at 422. But we too would have reviewed the opinion of the Illinois Appellate Court under our reading of Supreme Court precedent because the denial of Wooley's petition for leave to appeal was under a discretionary review process. *See* Ill. Sup. Ct. R. 315(a). The decision of the Illinois Appellate Court was both the "last reasoned opinion," *Woolley*, 702 F.3d at 422, as well as the "last state-court adjudication on the merits," *Greene*, 132 S. Ct. at 45.

The Fourth and Ninth Circuits held – and two Justices of the Supreme Court agree – that *Richter* governs only where "there was *no* reasoned decision by a lower court" and that *Ylst* provides the rule where there is one, *Cannedy*, 706 F.3d 1148; *see Hittson v. Chatman*, 135 S. Ct. 2126 (2015) (Ginsburg, J., joined by Kagan, J., concurring in the denial of certiorari); *Grueninger*, 813 F.3d at 525-27, but we respectfully disagree. That approach reads *Ylst* too broadly and *Richter* too narrowly. The Fourth Circuit cited *Brumfield* as limiting the *Richter* rule to circumstances in which no state court has written an opinion. *See Grueninger*, 813 F.3d at 526-27. But, as explained above, the Supreme Court in *Brumfield* looked through a discretionary denial of review and had no opportunity to apply or qualify *Richter*. In an opinion concurring in the denial of certiorari in *Hittson*, Justice Ginsburg stated that because *Ylst* directs federal habeas courts to "look through" state decisions "to determine whether a claim

was procedurally defaulted[,] [t]here is no reason not to 'look through' such adjudications, as well, to determine the particular reasons why the state court rejected the claim on the merits." *Hittson*, 135 S. Ct. at 2128. Yet one reason to "look through" for purposes of procedural default but no further is that appellate courts often affirm on bases not relied on by lower courts. Indeed, Justice Ginsburg's concurrence serves as a perfect illustration. She concurred in the denial of certiorari because she was "convinced that the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst*." *Id.* Justice Ginsburg was satisfied with our decision on the merits even though she did not agree with our reasoning. Because appellate courts may affirm for different reasons, presuming that state appellate courts affirm only for the precise reasons given by a lower court deprives them of the "benefit of the doubt" that the Act and *Richter* require, *Renico*, 559 U.S. at 773 (quoting *Visciotti*, 537 U.S. at 24).

III. CONCLUSION

We **REMAND** this appeal to the panel for consideration of the remaining issues.

JORDAN, Circuit Judge, joined by WILSON, MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges, dissenting:

If we are candid, we should acknowledge that the best we can do is predict which line of authority the

Supreme Court will use to decide whether, in an AEDPA habeas case, it is appropriate to presume that the Georgia Supreme Court's summary denial of a certificate of probable cause is based on the rationale articulated by the trial court in its reasoned decision. My prediction is that the Supreme Court will decide the issue differently than the en banc majority and hold that the presumption in *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 806 (1991), governs. With respect, therefore, I dissent.

1. The two cases that the majority primarily relies on – *Harrington v. Richter*, 562 U.S. 86 (2011), and *Cullen v. Pinholster*, 563 U.S. 170 (2011) – both arose in a scenario where only one state appellate court ruled on the claim and there was no reasoned decision by a lower court. *See Richter*, 512 U.S. at 96-97; *Pinholster*, 563 U.S. at 177-79. There was, in other words, no possibility of looking through the state appellate court's ruling in either of those cases. That difference is significant, particularly given that the Supreme Court has never (ever) applied *Richter* or *Pinholster* to a case involving a reasoned lower-court decision.

2. According to the majority, nothing in *Richter* suggests that its reasoning is limited to the narrow subset of habeas cases where there is no reasoned decision from any state court. That may be true, but *Ylst* was similarly silent with respect to its own reach. If the majority is right about the breadth of *Richter*, then the same goes for *Ylst*, as nothing in *Ylst* suggests that its look-through approach is limited to the subset of cases where the state lower court's rejection of a claim

on procedural grounds is later affirmed without explanation. So silence is a legal wash (or, if one prefers betting parlance, a push).

3. As we are reading tea leaves to divine what *Richter* means, it might be a good idea to start with what the Supreme Court has actually said about *Richter*. In a recent case citing *Richter*, the Supreme Court described its scope in narrow terms, limiting it to situations where there is no reasoned lower court decision. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2282-83 (2015) (characterizing *Richter* as "requiring federal habeas court to defer to hypothetical reasons state court might have given for rejecting federal claim *where there is no 'opinion explaining the reasons relief has been denied'*") (quoting *Richter*, 562 U.S. at 98) (emphasis added). If the Supreme Court has characterized *Richter* in this limited way, we should not become literary critics who profess to know the meaning of a work better than its author.

4. It would also be instructive to look at what the Supreme Court has done in a case similar to this one. *Premo v. Moore*, 562 U.S. 115 (2011), an AEDPA habeas case, was heard together with, and was decided on the same day as, *Richter*. Although *Moore* did not mention *Ylst*, or explicitly say that it was looking through to the last reasoned state court decision, that is what the Supreme Court seemed to do.

In *Moore*, the Oregon post-conviction court denied the defendant's ineffective assistance of counsel claim because it found that counsel's efforts to suppress

certain evidence would have been "fruitless." *Id.* at 119-20. The Oregon Court of Appeals "affirmed without opinion." *See Moore v. Palmateer*, 26 P.3d 191 (Or. Ct. App. 2001). After a federal district court denied the defendant's petition for a writ of habeas corpus and the Ninth Circuit reversed, the Supreme Court considered whether the state post-conviction court's reasoned decision (not the unexplained summary affirmance by the Oregon Court of Appeals) was an unreasonable application of federal law. *See Moore*, 562 U.S. at 132 ("The state postconviction court's decision involved no unreasonable application of Supreme Court precedent."). In the absence of a direct holding on the question before us, what the Supreme Court actually did in *Moore* is another indication that *Richter* should not be read too broadly. *Cf.* Oliver Wendell Holmes, The Common Law 5 (Howe ed. 1963) ("The life of the law has not been logic; it has been experience.").

5. *Sears v. Upton*, 561 U.S. 945 (2010), a non-habeas case decided before the passage of AEDPA, involved the Georgia Supreme Court's summary denial of a certificate of probable cause. In analyzing the claim at issue, the Supreme Court applied a look-through approach and reviewed not the summary denial, but the last reasoned state court decision. *Sears*, in my opinion, supports the application of the *Ylst* presumption here.

The state trial court in *Sears* ruled that the defendant's counsel had rendered deficient performance with regard to the investigation at the penalty phase,

but denied relief because in its view it could not speculate as to what the effect of the additional mitigating evidence (i.e., the additional mitigating evidence that would have been discovered had counsel performed a constitutionally adequate investigation) would have been. When the Georgia Supreme Court summarily denied him a certificate of probable cause, *see id.* at 946, the defendant sought a writ of certiorari.

The Supreme Court granted certiorari and reversed, holding that the state trial court had improperly applied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See Sears*, 561 U.S. at 952-53. The Supreme Court did not try to imagine hypothetical grounds on which the Georgia Supreme Court could have possibly rejected the ineffectiveness claim (and therefore found no "arguable merit" in the request for a certificate of probable cause). Instead, the Supreme Court repeatedly reviewed and discussed what the state trial court had done, and in fact reversed precisely because of what the state trial court had (improperly) done. *See, e.g.*, *id.* at 953-54 ("There are two errors in the state court's analysis of Sears' Sixth Amendment claim. First, the court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. . . . Second, and more fundamentally, the court failed to apply the proper prejudice inquiry."). Even the dissent in *Sears* focused on the rulings of the state trial court. *See, e.g.*, *id.* at 960 (Scalia, J., dissenting) ("Since the habeas court made no legal error en route to its *Strickland* conclusion, the only basis for

reversing the judgment here would be disagreement with the conclusion itself[.]").

Sears was not an AEDPA habeas case, but that difference in procedural context does not matter much, if at all. The Supreme Court had certiorari jurisdiction in *Sears* pursuant to 28 U.S.C. § 1254(a), which provides for review of "final judgments or decrees rendered by the highest court of a State in which a decision could be had[.]" The AEDPA provision that the majority focuses on here, 28 U.S.C. § 2254(d), allows those held in custody "pursuant to the judgment of a State court" to seek habeas relief, and instructs federal courts to not grant relief unless the state court "decision" was contrary to or involved an unreasonable application of clearly established federal law (as determined by the Supreme Court). To my mind, §§ 1254(a) and 2254(d) are similar in that they allow federal review of state court "judgments."

I am not, of course, saying that there were two different judgments under review in *Sears*, or that there are two different judgments under review in this case. The question we address is a different one: whether there should be a rebuttable presumption that where there is a reasoned decision by a lower court, an unexplained denial of relief by a state appellate court is based on the same rationale articulated by the lower court. And *Sears* suggests that the answer to that question is yes.

6. Two members of the Supreme Court believe that we erred in failing to apply the *Ylst* look-through

presumption to the Georgia Supreme Court's summary denial of a certificate of probable cause. *See Hittson v. Chatman*, 135 S. Ct. 2126, 2128 (2015) (Ginsburg, J., joined by Kagan, J., concurring in the denial of certiorari) ("The Eleventh Circuit plainly erred in discarding *Ylst*. In *Richter*, the only state court to reject the prisoner's federal claim had done so in an unexplained order. With no reasoned opinion to look through to, the Court had no occasion to cast doubt on *Ylst*. To the contrary, the Court cited *Ylst* approvingly in *Richter* and did again two years later in *Johnson v. Williams*, 568 U.S. ___, ___, n.1, 133 S.Ct. 1088, 1094 n.1 (2013)."). Two Justices do not a majority make, but their views should be given due consideration.

7. As far as I can tell, all of the circuits to have considered the look-through issue limit *Richter* to situations where there is no reasoned decision by any state court. *See Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525-26 (4th Cir. 2016) ("*Richter* addressed a situation in which a state habeas petition was presented directly to a state supreme court as an original petition and then denied by that court in a one-sentence summary order, so that there was no reasoned decision by any state court. . . . The situation is different when there is a state-court decision explaining the rejection of a claim. When a state appellate court summarily affirms a reasoned lower-court decision, or refuses a petition for review, then under *Ylst*, a federal habeas court is to 'look through' the unexplained affirmance[.]") (internal citations omitted); *Cannedy v. Adams*, 706 F.3d 1148, 1158 (9th Cir. 2013)

("[I]t does not follow from *Richter* that, when there *is* a reasoned decision by a lower state court, a federal habeas court may no longer 'look through' a higher state court's summary denial to the reasoning of the lower state court"); *Woolley v. Rednour*, 702 F.3d 411, 422 (7th Cir. 2012) (explaining that *Richter*, "[b]y its terms" is limited to cases "'[w]here a state court's decision is unaccompanied by an explanation'") (quoting *Richter*, 562 U.S. at 98). *See also Woodfox v. Cain*, 772 F.3d 358, 369 (5th Cir. 2014) ("Under AEDPA, 'we review the last *reasoned* state court decision.'") (emphasis added and citation omitted).

There should be strong reasons for creating a circuit split, and I do not see any such reasons here. The views of the Fourth, Fifth, Seventh, and Ninth Circuits, moreover, make practical sense. Starting with a result (the result reached in a summary denial of relief), then coming up with hypothetical reasons to support that result, and then assessing whether such imagined reasons are contrary to or an unreasonable application of clearly established Supreme Court precedent, is not what appellate courts normally do. The notion of a court starting with a result, and then searching far and wide for reasons to justify that result, turns the notion of neutral decisionmaking on its head. *Richter* requires us to perform that sort of analysis under AEDPA when there is one (and only one) summary state court decision denying relief, but there is no good reason to expand its reach beyond that limited procedural scenario.

8. The majority's conclusion is contrary to what we have done in the past. In published AEDPA habeas opinions both before and after *Richter*, we looked through the Georgia Supreme Court's summary denial of a certificate of probable cause and reviewed the decision of the state trial court, i.e., the last reasoned state court decision. *See Putnam v. Head*, 268 F.3d 1223, 1242-49 (11th Cir. 2001) (Black, Hull, and Wilson, JJ.); *Johnson v. Upton*, 615 F.3d 1318, 1330 (11th Cir. 2010) (Carnes, Hull, and Pryor, JJ.); *Bishop v. Warden*, 726 F.3d 1243, 1255-58 (11th Cir. 2013) (Barkett, Marcus, and Martin, JJ.); *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1317-33 (11th Cir. 2013) (Carnes, Tjoflat, and Jordan, JJ.). Apparently all of those panel decisions just misread *Ylst* and/or *Richter*.

9. Part of the majority's rationale also clashes with circuit precedent. According to the majority, a federal court would violate the requirements of § 2254 if it were to review the whole process by which a prisoner's federal claim was adjudicated. Because § 2254 refers to a single adjudication and its resulting decision, the majority concludes that a federal court may only review the final state court decision, instead of inspecting how different state courts ruled before that final decision was rendered. *See id.* The problem with the majority's reasoning is that it ignores (and would overrule or at least strongly conflict with) our decisions in *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227 (11th Cir. 2009), *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009), and *Loggins v. Thomas*, 654 F.3d 1204 (11th Cir. 2011). In these AEDPA habeas cases we examined and

reviewed both the last state court decision and the penultimate state court decision.

For example, in *Hammond* the Georgia trial court, on collateral review, ruled that counsel had not rendered deficient performance under the standard articulated in *Strickland*. On appeal, the Georgia Supreme Court expressly declined to address counsel's performance, and instead held that the defendant failed to show prejudice. When the case reached us, we did not have any trouble examining *both* the trial court's decision (on the performance prong) and the Georgia Supreme Court's decision (on the prejudice prong) in conducting AEDPA review. We held that "where a state trial court rejects a claim on one prong of the ineffective assistance of counsel test and the state supreme court, without disapproving that holding, affirms on the other prong, both of those state court decisions are due AEDPA deference." *Hammond*, 586 F.3d at 1332.

We therefore went on to review the reasoning given by *both* Georgia courts, at each level of review, to decide whether "*both* reasons for rejecting the claim are 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.'" *Id.* (emphasis added). In choosing to examine both decisions, we explained that "the critical fact . . . is that the Georgia Supreme Court does not appear to have disagreed with the trial court's decision on the deficiency element. The court could have easily expressed its disagreement, if any, but it did not do so." *Id.* at 1331.

In other words, we held in *Hammond* that silence on the part of the Georgia Supreme Court implied consent with the trial court's reasoning. That, by the way, is the assumption that *Ylst* is based on: "The maxim is that silence implies consent, not the opposite – and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Ylst*, 501 U.S. at 804. But here, for some reason, siience does not imply consent. Maybe I'm missing something, but it seems hard to reconcile the majority's categorical rejection of a look-through presumption outside the *Ylst* procedural bar context with our decisions in cases like *Hammond*. *See also Loggins*, 654 F.3d at 1217 (explaining, *post-Richter*, that "[o]ur case law also makes clear that we accord AEDPA deference not only to the adjudications of state appellate courts but also to those of state trial courts that have not been overturned on appeal"); *Windom*, 578 F.3d at 1249-51 (granting AEDPA deference to the state trial court's rejection of an ineffective assistance of counsel claim for lack of prejudice, even though the Georgia Supreme Court affirmed on performance grounds without reaching the prejudice issue). If, as the majority says, a federal court would violate § 2254 by looking at how lower state courts ruled, as opposed to the state supreme court ruled, then the underlying rationale for *Windom*, *Hammond*, and *Loggins* has been wiped away by a series of keystrokes.

Unfortunately for the district courts that now have to implement today's ruling, and the lawyers who have to live with it, the majority does not explain why

it believes its holding is consistent with *Windom* and its progeny. As I understand our circuit precedent following today's decision, when a state supreme court denies a claim in a reasoned opinion by relying on a single rationale and expressly declines to address a different rationale articulated by the lower court, a federal habeas court can nevertheless look through that state supreme court opinion and review (with AEDPA deference) the different rationale offered by the lower court in its reasoned opinion, on the theory that the supreme court's silence indicates acquiescence as to that unaddressed rationale. But when a state supreme court denies a claim summarily – i.e., without saying anything whatsoever about the lower court's rationale – a federal habeas court cannot look through the summary denial to the reasoned opinion of the lower court because in that scenario, apparently, silence does not indicate consent. Why this is so remains a mystery, and it will be left to district courts and future Eleventh Circuit panels to sort out the doctrinal mess.

JILL PRYOR, Circuit Judge, joined by WILSON, MARTIN, JORDAN, and ROSENBAUM, Circuit Judges, dissenting:

The question before the en banc Court today is whether a federal habeas court should look through a state appellate court's summary decision denying a petitioner relief to the reasoning in a lower state court decision when deciding whether the state appellate court's decision is entitled to deference under 28 U.S.C.

§ 2254(d). "Looking through" means that the federal habeas court presumes that when a state appellate court issues a summary decision, it has implicitly adopted the reasons given in a lower state court's decision for denying the petitioner's claims, absent strong evidence to rebut the presumption. The federal court then reviews the lower court's reasoning when deciding whether the state appellate court's decision is entitled to deference. By rejecting a look-through presumption, the majority places a far heavier burden on habeas petitioners than the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires. I reject the majority's position because (1) Supreme Court precedent indicates we should look through and (2) the majority opinion runs roughshod over the principles of federalism and comity that underlie federal collateral review of state court decisions.

First, although the United States Supreme Court has not explicitly held that federal habeas courts must look through a summary state appellate court decision to a lower court's reasoning when deciding whether the state appellate court's summary decision is entitled to deference under § 2254(d), the Supreme Court's decisions nonetheless support looking through. The Supreme Court first adopted a look-through presumption in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), holding that a federal habeas court should look through a summary state appellate court decision to the last reasoned state court decision to determine whether the summary decision rested on a state law procedural default. The Supreme Court's justification for the

presumption – that the state appellate court's summary decision indicated "agree[ment] . . . with the reasons given below" for rejecting the petitioner's claim – suggests a look-through presumption should be broadly applied. *Id.* at 804. But I acknowledge that in *Ylst* the Court did not consider whether a federal habeas court should treat a state appellate court's summary decision as adopting the lower court's reasons for rejecting the petitioner's claims on the merits.

Subsequently, in *Harrington v. Richter*, 562 U.S. 86 (2011), the Supreme Court addressed federal court review of a summary state appellate court's denial of collateral relief that was the only state habeas decision. The Supreme Court held that the federal court should defer to the summary decision "unless there was no reasonable basis for the state court to deny relief." *Id.* at 98. The majority contends that *Richter* controls how federal habeas courts should review all state appellate court summary decisions, but in *Richter* there was no reasoned decision from a lower court to look through to; thus, *Richter* did not address whether federal habeas courts should look through.

Although neither *Ylst* nor *Richter* addressed the exact issue before us today, in a companion case to *Richter, Premo v. Moore*, 562 U.S. 115 (2011), the Supreme Court implicitly looked through an Oregon Court of Appeals summary decision affirming the denial of relief to the state habeas trial court's opinion to determine whether the summary decision was entitled to deference under § 2254(d). Although the Supreme

Court in *Moore* did not expressly state that it was looking through, we should follow what the Supreme Court actually did in *Moore* – and look through here. And the Supreme Court has given us other signals indicating that we should look through that the majority largely ignores. The majority's extension of *Richter* also creates a circuit split, as it directly contravenes the decisions of at least two other circuits.

Second, the majority opinion tramples on the principles of federalism and comity that underlie federal collateral review. By rejecting a look-through presumption, the majority opinion treats the reasoned opinion of a Georgia superior court as a nullity merely because the Georgia Supreme Court subsequently rendered a summary decision. Although the Georgia Supreme Court has never explicitly stated that its summary decisions indicate agreement with the superior court's reasoning, there are good reasons to conclude that the Georgia Supreme Court's silence indicates agreement with and adoption of the lower court's reasoning. This inference is supported by the way in which Georgia has structured its habeas system to require a superior court to render a reasoned decision denying relief only after discovery and an evidentiary hearing while allowing the Georgia Supreme Court to issue a summary decision denying review; the Georgia Supreme Court's practice of issuing a reasoned decision denying an application for a certificate of probable cause when it disagrees with the superior court's reasoning; and the Georgia Supreme Court's continued use of summary decisions despite knowing that the United States

Supreme Court on direct review treats its silence as indicating agreement with and adoption of the superior court's reasoning. By requiring federal habeas courts to ignore this evidence about what the Georgia Supreme Court intended its summary decision to mean, the majority opinion violates the principles of federalism and comity that serve as the foundation for deference to state court proceedings under § 2254(d).

I am not alone in rejecting the majority's position. Two United States Supreme Court justices recently told us that we should use this en banc case as an "opportunity to correct [our] error" in failing to apply a look-through presumption. *Hittson v. Chatman*, 135 S. Ct. 2126, 2128 (2015) (Ginsburg, J., concurring in the denial of certiorari where looking through would not entitle the petitioner to relief). Justice Ginsburg, joined by Justice Kagan, wrote that we had "plainly erred" and should instead 'look through' [the Georgia Supreme Court's summary] adjudications . . . to determine the particular reasons why the state court rejected the claim on the merits." *Id.* Although the opinion of two justices of course does not bind us, it nevertheless should give us pause about whether the majority has correctly interpreted *Ylst*, *Richter*, and *Moore* or correctly applied the core principles of federalism and comity undergirding federal habeas review under § 2254(d).

I. BACKGROUND

The question of whether we should adopt a look-through presumption arises in the context of our review of Georgia death row inmate Marion Wilson's federal habeas petition. Mr. Wilson was convicted of malice murder and sentenced to death. The Georgia Supreme Court affirmed the conviction and sentence. Mr. Wilson petitioned the Superior Court of Butts County, Georgia for collateral relief, arguing among other points that his trial counsel provided ineffective assistance by failing to investigate mitigation evidence at the penalty phase. After discovery and a two-day evidentiary hearing, the superior court denied Mr. Wilson's petition in a lengthy written order, determining that some of his claims were procedurally defaulted under Georgia law and others failed on the merits. With respect to the ineffective assistance of counsel claim based on counsel's failure to investigate mitigation evidence, the superior court explained that the claim failed for two reasons: counsel's performance was not deficient and Mr. Wilson had not demonstrated prejudice. Mr. Wilson applied for a certificate of probable cause to appeal to the Georgia Supreme Court, which denied his application in a one-sentence summary order. He then sought review in the United States Supreme Court, which denied his petition for certiorari.

Mr. Wilson then petitioned for a writ of habeas corpus in federal court based on ineffective assistance of counsel. The district court denied his petition, concluding that the state court's adjudication was entitled to

deference under 28 U.S.C. § 2254(d). In deciding whether to defer to the state court's adjudication of Mr. Wilson's claim, the district court looked through the Georgia Supreme Court's summary denial of the application for a certificate of probable cause to the superior court's reasoning. The district court acknowledged that "the conduct of Wilson's trial attorneys with regard to their investigation and presentation of mitigation evidence is difficult to defend." Order at 1 (Doc. 51).[1] But it denied relief because even if the superior court unreasonably determined that trial counsel's performance was not deficient, the superior court's determination that Mr. Wilson could not establish prejudice was entitled to deference.

Mr. Wilson appealed. After correctly determining that the Georgia Supreme Court summary decision was the relevant state court decision for review, a panel of this court held that it was not required to review the reasoned opinion of the superior court and instead framed the issue as "whether there was any reasonable basis for the [Georgia Supreme Court] to deny relief." *Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671,

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[1] As the district court explained, just four months before the start of trial, the two lawyers who served as Mr. Wilson's trial counsel had not begun their mitigation investigation or even decided who would be responsible for the mitigation investigation. Through trial, each attorney believed the other was primarily responsible for developing the mitigation case. As a result, trial counsel never interviewed any background witnesses. Although there were red flags about Mr. Wilson's background in documentary evidence, counsel failed to expand their investigation beyond the records.

678 (11th Cir. 2014) (alteration in original) (internal quotation marks omitted), *reh'g en banc granted, op. vacated*, No. 1410681 (11th Cir. July 30, 2015). We vacated the panel opinion to review en banc whether we should look through to the superior court's reasoning when deciding whether the Georgia Supreme Court's summary decision is entitled to AEDPA deference. Although only Mr. Wilson's case is presently before us, our resolution of this issue will effect numerous other habeas petitioners in Georgia, including many death row inmates.[2]

II. ANALYSIS

Section 2254(d) governs when a federal habeas court must defer to a state court's adjudication of a habeas claim. This provision forbids a federal court from granting an application for a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" in the state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *see Parker v. Sec'y for Dep't of Corr.*, 331 F.3d

[2] Since February 2015, Georgia has executed nine individuals. Eight of them applied to the Georgia Supreme Court for a certificate of probable cause after the state habeas trial court denied relief. The Georgia Supreme Court denied each application in a summary order.

764, 775-76 (11th Cir. 2003) (describing § 2254(d) as requiring federal courts to give deference to state court decisions).

Although § 2254(d) does not identify the state court decision to which we defer when multiple state courts have reviewed the petitioner's claim, the Supreme Court has explained that under § 2254(d) a federal habeas court reviews only one decision: "the last state-court adjudication on the merits." *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011). The majority and I agree that here the last state court decision on the merits is the Georgia Supreme Court's denial of Mr. Wilson's application for a certificate of probable cause. *See Foster v. Chatman*, 136 S. Ct. 1737, 1746 n.2 (2016). Accordingly, we agree that to pierce AEDPA deference Mr. Wilson must show that the Georgia Supreme Court's decision was contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. The majority opinion and I part ways, however, when it comes to the approach a federal habeas court should take in applying § 2254(d)'s standard to the Georgia Supreme Court's summary decision.

I believe that we should presume the Georgia Supreme Court adopted the superior court's reasoning and in effect review whether the superior court's application of federal law and determination of the facts are entitled to deference. To address why, I begin by explaining that a federal habeas court's application of § 2254(d)'s standard depends upon whether the state court rendered a reasoned decision. I then discuss why

the federal habeas court should presume that when the Georgia Supreme Court summarily denies an application for a certificate of probable cause, it implicitly adopted the superior court's reasoning. Because this presumption allows the federal court to attribute reasoning to the Georgia Supreme Court's decision, I would have the federal court review whether the reasoning in the Georgia superior court's decision – which the Georgia Supreme Court implicitly adopted in its summary decision – is entitled to deference under § 2254(d).

A. The Nature of Federal Review under § 2254(d) of State Court Decisions

I begin with the nature of a federal court's review of a state court decision under § 2254(d). More specifically, when must a federal court review the actual reasoning set forth in a state court decision and when must the court instead hypothesize possible reasons that could have supported the state court decision? In analyzing deference to a state court decision under § 2254(d), the Supreme Court has applied two distinct modes of analysis. The first mode applies when there is a reasoned decision from the state court. I refer to this as the "reasoned-decision" approach. In these cases, a federal habeas court reviews the reasoning set forth in the state court decision and then determines whether that reasoning is entitled to deference. The second mode applies when there is no reasoned state court decision. I refer to this as the "unexplained-decision" approach. In such cases, the federal habeas

court may conjure up hypothetical arguments or theories that could have supported the result the state court reached and then reviews whether those arguments or theories are entitled to deference.

1. The Reasoned-Decision Approach

Under the reasoned-decision approach, in considering whether to defer to a state court decision under § 2254(d), a federal habeas court reviews the reasoning in the state court decision, not the result the state court reached. The Supreme Court applied this approach when it pierced AEDPA deference in *Wiggins v. Smith,* 539 U.S. 510 (2003).

In *Wiggins*, the petitioner, who was sentenced to death, argued that his trial counsel rendered ineffective assistance by failing to investigate his background or present mitigating evidence at his sentencing. *Id.* at 514. In state habeas proceedings, the Maryland Court of Appeals rejected the ineffective assistance claim, reasoning that because the defense attorneys had some information about the petitioner's background, they made a tactical choice not to present a mitigation defense. *Id.* at 527. The United States Supreme Court pierced AEDPA deference because the state court's application of legal principles was unreasonable, in that the Maryland Court of Appeals failed to consider whether the petitioner's counsel should have investigated further. *See id.* ("In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known

to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). Importantly, the Supreme Court never considered hypothetical arguments or theories that could have supported the Maryland Court of Appeals's decision to deny relief, because for purposes of piercing AEDPA deference it was sufficient that the reasoning of that decision unreasonably applied clearly established federal *law. Id.* at 534.[3]

Significantly, if the petitioner demonstrates that the state trial court's reasoning was contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of fact, he has pierced AEDPA deference and is entitled to *de novo* review from the federal habeas court. *See Panetti*

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[3] The Supreme Court has applied the reasoned-decision approach many times. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 42 (2009) (holding that state court unreasonably applied clearly established law because in its analysis the court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"); *Panetti v. Quarterman*, 551 U.S. 930, 952-53 (2007) (explaining that state court's determination that it had provided petitioner with adequate procedures to resolve his competency claim unreasonably applied clearly established federal law); *see also Early v. Packer*, 537 U.S. 3, 8 (2002) (explaining that no deference is required under § 2254 when "the reasoning" in a state court decision is contrary to clearly established law). So too have we. *See Evans v. Sec'y Dep't of Corr.*, 703 F.3d 1316, 1328 (11th Cir. 2013) (en banc) (Pryor, William, J.) (explaining that under AEDPA a federal habeas court must identify "the arguments supporting the decision" of the Florida Supreme Court and defer if " 'it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]' " (alteration in original)).

v. Quarterman, 551 U.S. 930, 954 (2007) (holding that state habeas court decision was not entitled to deference under § 2254(d) and then "consider[ing] petitioner's claim on the merits"). As a result, the district court considering his habeas claim "is no longer bound by § 2254(d) or limited to consideration of the facts developed in the state court record." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1280 (11th Cir. 2016).

2. The Unexplained-Decision Approach

The Supreme Court recognized an exception to the reasoned-decision approach that allows a federal habeas court to consider hypothetical arguments or theories that could have supported the state court decision when the state court does not explain its reasons for denying relief – what I am calling the unexplained-decision approach. When federal habeas courts apply the unexplained-decision approach, they in effect review whether the result reached by the state court is entitled to deference. *See Richter*, 562 U.S. at 98. A chronology of Supreme Court decisions illustrates that the unexplained-decision approach was intended to be a narrow exception that applies only when no state court has provided reasons for rejecting the petitioner's claims.

In *Richter*, the Supreme Court first adopted the unexplained-decision approach when confronted with how to apply AEDPA's deferential standard to a California Supreme Court summary decision that was the *only* state court decision to address the petitioner's

claim. In *Richter*, the petitioner sought habeas relief on his ineffective assistance of counsel claim in the first instance in the California Supreme Court, as permitted under California procedure.[4] The CaliforniaSupreme Court denied his petition in a one-sentence order. *Id.* at 96. The petitioner then sought federal habeas relief. The Ninth Circuit concluded that the California Supreme Court's decision was not entitled to deference because its decision denying relief was unreasonable. *Id.* at 97. The United States Supreme Court reversed, concluding that the California Supreme Court's summary decision was entitled to deference under § 2254(d). *Id.* at 113.

The United States Supreme Court faced the dilemma of how a federal habeas court should review the California Supreme Court's summary decision under § 2254(d). Although the petitioner argued that the summary decision was not on the merits, which would make § 2254(d) inapplicable, the United States Supreme Court rejected this argument. *Id.* at 98-99. And because there was no state court decision explaining why the petitioner's claim failed, it was impossible for a federal habeas court to apply the reasoned-decision approach. The Supreme Court resolved this problem by announcing a new approach to applying § 2254(d)'s standard. The Supreme Court recognized that in some

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[4] Each year more than 3,400 original petitions for a writ of habeas corpus are filed directly with the California Supreme Court, making up over one-third of that court's caseload. *See Richter*, 562 U.S. at 99.

cases federal habeas courts review the state habeas court's reasoning and in others the result:

> Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Id. at 102. Because the California Supreme Court's decision was unaccompanied by an explanation, the federal habeas court could consider arguments or theories that "could have supported the state court decision." *Id.* The petitioner then had to show that "there was no reasonable basis for the state court to deny relief." *Id.* at 98. In effect, the petitioner had to show that the *result* reached by the California Supreme Court was unreasonable. And in deciding whether the result – that is, the denial of relief – was unreasonable, the federal habeas court could consider only the record that was before the state appellate court. *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011).

After *Richter*, circuits were split about the proper mode for federal habeas courts to use when the last state court decision was accompanied by an explanation, with some circuits treating *Richter* as requiring federal habeas courts to review only the result reached by a state court even when the state court decision was

accompanied by an explanation.[5] *Compare Green v. Thaler*, 699 F.3d 404, 414 (5th Cir. 2012) (explaining that federal habeas courts "review the state court's actual decision, not the written opinion on which it is based"), *with Woolley v. Rednour*, 702 F.3d 411, 422 (7th Cir. 2012) (concluding that *Richter*'s unexplained-decision approach applies only when "a state court decision is unaccompanied by an explanation" (internal quotation marks omitted)), *and Rayner v. Mills*, 685 F.3d 631, 637-38 (6th Cir. 2012) (same). Then, in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), the Supreme Court clarified that under § 2254(d) federal habeas courts must apply the reasoned-decision approach whenever a state court decision is explained, meaning that federal courts should consider hypothetical arguments or theories only when there was no reasoned state court decision at all.

In *Brumfield*, the Supreme Court pierced AEDPA deference because the Louisiana state trial court's denial of an evidentiary hearing on the petitioner's claim that he could not be executed on account of his intellectual disability was based on unreasonable factual determinations. *Id.* at 2274. The state of Louisiana argued that even if the state habeas court had made unreasonable determinations of fact, its decision was

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[5] To be clear, this circuit split – about whether *Richter* required federal habeas courts to review the result reached, not the reasoning, of a state court – is distinct from the circuit split created by the majority opinion in this case, which concerns whether a federal habeas court should presume that a state appellate court's summary decision adopted a lower court's reasons for rejecting the petitioner's claim.

entitled to deference under § 2254(d) because the result was reasonable given the petitioner's failure to present evidence that his intellectual disability manifested before he reached adulthood. *Id.* at 2282. Put another way, Louisiana argued that the Supreme Court should defer to a hypothetical justification for the denial of relief, even though the state habeas court had issued a reasoned decision.

The Supreme Court rejected Louisiana's position, explaining that because "the state trial court never made any finding that [the petitioner] had failed to produce evidence suggesting he could meet this age-of-onset requirement," there was "no determination on that point to which a federal court must defer in assessing whether [the petitioner] satisfied § 2254(d)." *Id.* Distinguishing *Richter*, the Supreme Court explained that federal habeas courts must defer to "hypothetical reasons [the] state court might have given for rejecting [the] federal claim" only when there is "no 'opinion explaining the reasons relief has been denied.'" *Id.* at 2282-83 (quoting *Richter*, 562 U.S. at 98).[6]

In many cases, it is clear whether the reasoned-decision or unexplained-decision approach should apply. When the last state court decision on the merits explains why the petitioner is not entitled to relief, the

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[6] The majority's position that in *Brumfield* the Supreme Court "had no opportunity to apply or qualify *Richter*" simply cannot be squared with the Supreme Court's decision. Maj. Op. at 30. In *Brumfield* the Supreme Court clarified that federal habeas courts should not use the unexplained-decision approach announced in *Richter* when there is a reasoned state court decision.

Supreme Court has applied the reasoned-decision approach when considering whether to defer to the state court decision under § 2254(d). Conversely, when no state court has issued a reasoned decision, the Supreme Court has told us that the federal habeas courts should use the unexplained-decision approach. This case requires us to consider a more difficult question: how should a federal habeas court treat a state appellate court's unexplained summary decision when a lower state court *has* rendered a reasoned decision?

B. Looking Through a Summary State Appellate Court Decision When a Lower Court Has Rendered a Reasoned Decision

I would adopt a look-through rule and presume that when a state appellate court renders a summary decision after a lower state court issued a reasoned decision, the state appellate court adopted the lower court's reasoning. To be clear, with a look-through presumption, the federal habeas court still would review the last state court decision on the merits – the summary decision. The presumption simply provides a way of identifying the arguments or theories on which the state appellate court relied in its summary decision for the purpose of affording deference under § 2254(d). Because the presumption permits reasoning to be attributed to the Georgia Supreme Court's decision, I would have a federal habeas court use the reasoned-decision approach to review the Georgia Supreme

Court's decision.[7] As I explain below, adopting a look-through approach is appropriate for two reasons: (1) it is more consistent with the Supreme Court's leading

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[7] I note that the majority opinion is utterly inconsistent with our decision in *Hammond v. Hall*, 583 F.3d 1289 (11th Cir. 2009), in which we reviewed both the trial court's decision and the Georgia Supreme Court's decision under § 2254(d). In *Hammond*, the petitioner brought an ineffective assistance of counsel claim in Georgia superior court. The superior court denied the claim on the basis that the petitioner failed to establish deficient performance, without addressing prejudice. 586 F.3d at 1330. The petitioner then sought to appeal to the Georgia Supreme Court. After granting a certificate of probable cause, the Georgia Supreme Court affirmed the superior court's decision but held that the petitioner failed to show prejudice and explicitly declined to address deficient performance. *Id.* Reviewing the petitioner's federal habeas petition, we held that "where a state trial court rejects a claim on one prong of the ineffective assistance of counsel test and the state supreme court, without disapproving that holding, affirms on the other prong," the petitioner must show both reasons for rejecting the claim are not entitled to deference under § 2254(d). *Id.* at 1332.

Our decision in *Hammond* can be understood in one of two ways: either (1) federal courts may review more than one state court decision when applying § 2254(d), or (2) federal courts may presume that a state appellate court by its silence adopted a lower court's reasoning. Either way the majority has countermanded *Hammond*. First, the majority rejects the position that federal habeas courts may consider more than one state court decision under § 2254(d). *See* Maj. Op. at 8 (directing that under § 2254(d), we only "review one decision"). Second, the majority forbids federal habeas courts from presuming that a state appellate court silently adopted the reasoning of a lower court. *See id.* at 21. Although the en banc court is not bound by prior panel precedent, I am troubled that the majority opinion never acknowledges its conflict with *Hammond* or offers an explanation for departing from this precedent.

decisions, and (2) it best gives effect to the principles of federalism and comity that undergird § 2254(d).

1. The Leading Supreme Court Decisions Support a Look-Through Presumption.

The Supreme Court's decisions in *Ylst*, 501 U.S. 797, and *Moore*, 562 U.S. 115, inform us why federal habeas courts should apply a look-through presumption when deciding whether a state appellate court's summary decision is entitled to deference under § 2254. Together these cases demonstrate that it is appropriate for federal courts to presume that a state appellate court's summary decision indicates agreement with the lower court's reasons for rejecting the petitioner's habeas claim on the merits.

a. *Ylst v. Nunnemaker*

The Supreme Court first recognized the look-through presumption in *Ylst*, where it treated a state appellate court's summary decision as adopting the grounds in the last reasoned decision that rejected the petitioner's habeas claim. In *Ylst*, a California inmate argued on direct appeal that the prosecution introduced evidence that was inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Ylst*, 501 U.S. at 799. The California Court of Appeal affirmed, explaining that under a state procedural rule the *Miranda* claim could not be raised for the first time on appeal. *Id.* The inmate petitioned, in turn, a California trial court, the California Court of Appeal, and the California

Supreme Court for collateral relief. Each court summarily denied relief. *Id.* at 800. The inmate then sought a writ of habeas corpus in federal district court. The Ninth Circuit granted relief, holding that the California Supreme Court's silent denial of collateral relief lifted the procedural bar imposed on direct review. *Id.* at 801. The United States Supreme Court granted certiorari to address "how federal courts in habeas proceedings are to determine whether an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment) rests primarily on federal law." *Id.* at 802.

The Supreme Court held that federal courts should apply a look-through presumption to determine whether a state court's unexplained order applied a procedural bar, meaning "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.* at 803. This presumption may be rebutted with "strong evidence" that the later state court decision did not rely upon a procedural default, for example, where "a retroactive change in law had eliminated that ground as a basis of decision, and the court which issued the later unexplained order had directed extensive briefing limited to the merits of the federal claim." *Id.* at 804.

Although the question before the Supreme Court concerned only whether the later summary decision rested on a procedural ground like the last reasoned

decision, the Supreme Court justified the look-through presumption in broad terms:

> The maxim is that silence implies consent, not the opposite – and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. The essence of unexplained orders is that they say nothing. We think that a presumption which gives them *no* effect – which simply "looks through" them to the last reasoned decision – most nearly reflects the role they are ordinarily intended to play.

Id. at 804. Even if dicta, this broad reasoning suggests that a look-through presumption is appropriate not only to determine whether the state appellate court applied a procedural default, but also to identify the reasons why the state appellate court rejected the merits of the petitioner's claims.[8]

The majority opinion reads *Ylst* as supporting only a presumption that "a summary affirmance rests on the same *general* ground – that is, a procedural ground or on the merits – as the judgment under review." Maj. Op. at 17. The majority relies on language in *Ylst* stating it would be "'most improbable' that an 'unexplained order leaving in effect a decision . . . that expressly relies upon procedural bar' actually 'reject[ed] that bar and decid[ed] the federal question.'"

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[8] We must, of course, bear in mind that "there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006).

Id. (alterations in original) (quoting *Ylst*, 501 U.S. at 803-04). Importantly, though, the next sentence in *Ylst* explains why such a conclusion would be improbable: because courts affirm "without further discussion when they agree, not when they disagree, with the reasons given below." *Ylst*, 501 U.S. at 804. Indeed, the Supreme Court recently has called into question the majority's contention that *Ylst*'s look-through presumption means only that the state appellate court agreed with the same general ground as the lower court, not its precise reasoning. *See Kernan v. Hinojosa*, 136 S. Ct. 1603 (2016) (holding that *Ylst* presumption was overcome when there was strong evidence that the California Supreme Court's summary decision denying relief did not rest on precisely the same procedural ground as the California trial court's decision, without considering whether the California Supreme Court agreed with the more general conclusion that some procedural ground barred review).

I acknowledge there was no holding in *Ylst* that federal habeas courts should presume that a state appellate court adopted a lower court's reasons for rejecting a habeas petitioner's claims on the merits. But the rationale in *Ylst* – that a summary affirmance indicates agreement with the lower court's reasons absent strong evidence to the contrary – equally supports treating a state appellate court's summary affirmance as adopting a lower court's reasoning for rejecting the merits of the petitioner's claims.[9]

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[9] I note that prior to *Richter*, when reviewing state appellate court decisions for purposes of § 2254(d), we extended *Ylst* beyond

b. *Premo v. Moore* and *Harrington v. Richter*

Moore and *Richter* were companion cases – argued on the same day and then decided on the same day in opinions authored by Justice Kennedy. The majority contends *Richter* dictates that we must review the Georgia Supreme Court's summary decision using the unexplained-decision approach. But *Richter* did not address whether federal habeas courts should look through, because in *Richter* the California Supreme Court was the only state court to render a decision on the petitioner's claims. Although *Richter* never addressed what mode federal habeas courts should use when there is both a summary state appellate court decision and a reasoned lower court decision, the majority opinion extends *Richter*'s unexplained-decision approach beyond the "subset of habeas petitions where there is no reasoned decision from any state court," concluding that "[t]here is no basis in [§ 2254(d)] or *Richter* for two divergent analytical modes – one when

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the procedural default context and presumed that a state appellate court's summary affirmance adopted the lower court's reasons for rejecting the petitioner's claims on the merits. *See McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1261 n.12 (11th Cir. 2009); *Putman v. Head*, 268 F.3d 1223, 1232, 1242 (11th Cir. 2001) (looking through Georgia Supreme Court's summary denial to superior court's reasoning). We were not alone: other circuits similarly interpreted *Ylst*. *See, e.g.*, *Cannedy v. Adams*, 706 F.3d 1148, 1158 (9th Cir. 2013) (explaining it was a "common practice of the federal courts to examine the last reasoned state decision to determine whether a state-court decision is 'contrary to' or an 'unreasonable application of' clearly established federal law").

there is no previous reasoned decision below and another for when there is."[10] Maj. Op. at 16. I disagree.

The majority's extension of *Richter*'s unexplained-decision approach to all summary state court decisions creates tension with the text and structure of § 2254(d). Congress structured § 2254(d) to provide for two distinct bases, set forth in separate subsections, for piercing AEDPA deference when a state court decision is (1) contrary to or an unreasonable application of clearly established federal law or (2) based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2); *see also Rice v. Collins*, 546 U.S. 333, 342 (2006) ("The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law."). If a federal habeas court limits its review to the summary decision from the Georgia Supreme Court, it may be able to determine that, based on the record and state of the law, the Georgia Supreme Court's decision was unreasonable. But it will be unable to determine whether the decision was unreasonable because the state court's analysis was (1) contrary to or an unreasonable application of law or (2) based on an unreasonable determination of the facts. Assume, for example, that a summary denial is issued in a case alleging ineffective

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[10] Nothing in § 2254(d) or the case law interpreting it supports the majority's position that all summary state appellate court decisions must be reviewed in the same way, regardless of whether there was a reasoned decision from a lower court. Indeed, the majority's emphasis on the need for a uniform approach ignores that the Supreme Court has already applied two distinct analytical modes for applying § 2254(d)'s standard.

assistance of counsel based on the failure to investigate potential mitigation evidence. The Georgia Supreme Court's summary denial may have been based on an erroneous factual finding that counsel did investigate mitigation evidence or, alternatively, the denial may have been based on a correct determination of fact but a misapplication of Supreme Court precedent like *Wiggins*, 539 U.S. 510, or *Rompilla v. Beard*, 545 U.S. 374 (2005). The federal habeas court would have no way to know which it was.

I acknowledge that in *Richter* the Supreme Court implicitly accepted that federal habeas courts may blur the distinction between § 2254(d)(1) and (2) when reviewing a summary state court decision if there was no reasoned decision from *any* state court. But given the inherent tension between *Richter* and the structure of § 2254(d), *Richter*'s unexplained-decision approach should not be extended to apply when there is a reasoned decision from a state court.

Although Justice Kennedy did not address in *Richter* the approach that federal habeas courts should apply to review a summary state appellate court decision when there is a reasoned decision from a lower court, his opinion in *Moore* implicitly answered this question and supports limiting the unexplained-decision approach to cases where no reasoned state court decision exists. Put another way, *Moore* shows that the approach a federal habeas court takes to review a state appellate court's summary decision turns on whether the lower state court rendered a reasoned decision. After all, in *Moore*, the Supreme Court looked

through the state appellate court's summary decision on the merits to whether the lower court had given reasons for denying the petitioner's claim.

After pleading no contest to a felony murder charge, Moore sought a writ of habeas corpus in Oregon state trial court, alleging he had been denied effective assistance of counsel when his attorney failed to file a motion to suppress his confession. 562 U.S. at 119. The state habeas trial court held an evidentiary hearing and denied Moore's habeas claim on the ground that it would have been fruitless for his counsel to file a motion to suppress in light of his other admissible confessions. *Id.* at 119-20. The Oregon Court of Appeals "affirmed without opinion." *Moore v. Palmateer*, 26 P.3d 191 (Or. Ct. App. 2001).[11]

Moore next filed in federal court a petition for a writ of habeas corpus claiming ineffective assistance of counsel. *Moore*, 562 U.S. at 120. After the district court denied relief and the Ninth Circuit reversed, the United States Supreme Court considered whether under § 2254(d) it was required to defer to the last state court decision on the merits, which was the summary decision of the Oregon Court of Appeals.[12] Although the

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[11] The Oregon Supreme Court then denied the petitioner's request for discretionary (certiorari-like) review. *Moore v. Palmateer*, 30 P.3d 1184 (Or. 2001).

[12] Under Oregon law, the Oregon Court of Appeals's summary affirmance was a decision on the merits. *See* Or. Stat. § 34.710 (providing petitioner the right to appeal a trial court judgment refusing to allow a habeas writ).

Supreme Court never explicitly stated that it was looking through, its discussion of the content of the state trial court's decision shows that it looked through the Oregon Court of Appeals's summary decision. Indeed, the Supreme Court quoted directly from the state trial court's decision, showing that it treated the appellate court's summary denial as adopting that decision. *See id.* at 123 ("Finding that any 'motion to suppress would have been fruitless,' the state postconviction court concluded that Moore had not received ineffective assistance of counsel." (quoting state trial court decision)). The Supreme Court's focus on the state trial court's reasoning demonstrates that when the Supreme Court reviews a state appellate court's summary decision, it presumes that the summary decision adopted the lower court's reasons for rejecting the claim.

In *Moore*, the state trial court's rationale was indeterminate, though, because its decision "did not specify" whether it denied relief "because there was no deficient performance under *Strickland* or because Moore suffered no *Strickland* prejudice, or both." *Id.* Because the trial court – and via the look-through presumption the Oregon Court of Appeals – inadequately identified the basis on which the petitioner's claim failed and in effect rendered an unexplained decision, the Supreme Court ultimately applied the unexplained-decision approach to review the state court's decision. *Id.* If, as the majority contends, the United States Supreme Court was not looking through, the Supreme Court would have considered only the Oregon Court of Appeals's summary decision and would have had no

reason to explain why the state trial court's reasoning was indeterminate.

Again, I concede that neither *Ylst* nor *Richter* expressly answers the question of whether we should look through a state appellate court's summary decision for purposes of deciding whether that decision is entitled to deference under § 2254(d). But when that very scenario came before the Supreme Court in Moore – authored by Justice Kennedy and issued on the very same day as his opinion in *Richter* – the Court implicitly applied a look-through presumption to try to ascertain the reasoning behind the Oregon Court of Appeals's summary decision. *Moore* should guide our analysis here: it demonstrates that federal habeas courts should (1) presume that the state appellate court adopted the lower court's reasoning, (2) identify the actual reasoning set forth in the lower court's decision, and then (3) apply the reasoned-decision approach to determine whether those reasons are entitled to deference under § 2254(d).

c. Justice Ginsburg's Special Concurrence in *Hittson v. GDCP* Explains that We Should Look Through.

After *Moore*, Justice Ginsburg wrote an opinion specially concurring in the denial of certiorari in *Hittson* to make clear that we should look through. Post-*Richter*, in *Hittson*, a Georgia death row inmate sought certiorari after our Court affirmed the denial of his federal habeas petition. Our Court refused to look

through the Georgia Supreme Court's summary decision denying a certificate of probable cause and instead reviewed the Georgia Supreme Court's decision using the unexplained-decision approach. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1232 n.25 (11th Cir. 2014), *cert. denied sub nom. Hittson v. Chatman*, 135 S. Ct. 2126 (2015). Although the Supreme Court denied certiorari, Justice Ginsburg, in a concurrence joined by Justice Kagan, explained that *Richter* did not require federal habeas courts to "hypothesize reasons that might have supported" the Georgia Supreme Court's unexplained order because there was a reasoned decision from a lower court, meaning the state court's "reasons can be ascertained." *Hittson*, 135 S. Ct. at 2127-28 (Ginsburg, J., concurring in denial of certiorari).[13] Of course, Justice Ginsburg's concurrence is not binding on us. But it nevertheless should not be ignored: it both reflects the view of at least two justices on the question before us and correctly explains why we should look through here.

Importantly, Justice Ginsburg's concurrence in *Hittson* was issued the same week that the Supreme Court in *Brumfield* affirmed that *Richter*'s unexplained-decision approach applies only when there is no reasoned decision from any state court. These cases taken

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[13] Although Justice Ginsburg disagreed with our Court's rejection of the look-through presumption, she ultimately concurred in the denial of Mr. Hittson's petition because the state trial court's reasoning was entitled to deference under § 2254(d). *See Hittson*, 135 S. Ct. at 2128 ("I am convinced that the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst*.").

together show the majority is wrong to reject a look-through presumption and extend the unexplained-decision approach beyond the particular scenario that the Supreme Court faced in *Richter* – that is, when there is no reasoned decision from *any* state court rejecting the petitioner's claim.[14]

d. The Majority Opinion Creates a Circuit Split.

The majority contends *Richter* dictates that we should not look through, but no other circuit has adopted its position. Instead, we are the only circuit – out of three to confront the issue – to hold that federal habeas courts should not look through to find the reasons a state appellate court denied the petitioner's claims on the merits and should instead apply the unexplained-decision approach whenever a state court renders a summary decision, even when there is a reasoned decision from a lower court. *See Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 526 (4th Cir. 2016) ("[W]e may assume that the Supreme Court of Virginia

[14] Indeed, the combination of the *Hittson* concurrence and *Brumfield* caused the Georgia Attorney General to change his position in this case because "[i]t simply does not seem to be the better choice to refuse to look at the last reasons given by a state court in deciding a claim and [*Richter*] provides no language suggesting that the last *reasoned* opinion should not be looked to for federal habeas review." Appellee Br. at 18. Although this concession certainly does not bind us, it is telling that Georgia's Attorney General changed his position even though the result would be that petitioners face a lighter, and the state a correspondingly heavier, burden on federal review of summary denials of habeas relief.

has endorsed the reasoning of the Circuit Court in denying Grueninger's claim, and it is that reasoning that we are to evaluate against the deferential standards of § 2254(d)."); *Cannedy v. Adams*, 706 F.3d 1148, 1159 (9th Cir. 2013) (explaining that "*Richter* does not change our practice of 'looking through' summary denials to the last reasoned decision – whether those denials are on the merits or denials of discretionary review" and then applying the reasoned-decision approach (footnote omitted)).[15]

The majority opinion provides no good reason for creating a circuit split. Its attack on the reasoning of the Fourth and Ninth Circuits is based on its flawed assumption that the unexplained-decision approach applies to all state court summary decisions, even where there is a reasoned decision from a lower state court. But, as explained above, *Richter* does not address whether federal habeas court should look through, and the majority opinion ignores that the Supreme Court in *Moore* implicitly looked through.

2. Principles of Federalism and Comity Support a Look-Through Presumption.

Even if the Supreme Court had not recognized that federal habeas courts should look through a state

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[15] In addition, at least one other circuit has in dicta suggested that it would look through a state appellate court's summary decision on the merits to the last reasoned opinion. *See Woodfox v. Cain*, 772 F.3d 358, 359 (5th Cir. 2014) ("Under AEDPA, 'we review the last reasoned state court decision.' ").

appellate court's summary decision when reviewing that decision under § 2254(d), we should adopt a look-through presumption because it best honors principles of federalism and comity. The majority and I agree that principles of federalism and comity should guide our analysis. We disagree, however, about how to apply these principles here. The majority believes these principles compel rejection of a look-through rule, but I believe these principles lead inescapably to the conclusion that federal habeas courts should treat a state appellate court's summary decision as adopting the reasons given by the lower court for denying a petitioner's claims on the merits.

I conclude that adopting a look-through presumption best serves principles of federalism and comity for four reasons. First, although the Georgia Supreme Court has never stated explicitly that it agrees with the superior court's reasons for rejecting a petitioner's claims when it renders a summary decision, there is strong support for the inference in Georgia procedure and the Georgia Supreme Court's practices.

Second, although principles of federalism and comity prohibit a federal habeas court from forcing a state court to set forth reasons why it rejected a petitioner's claim, contrary to the majority's contention looking through imposes no opinion-writing standard. This is because a state appellate court can overcome the look-through presumption by something as simple as issuing a one-sentence summary decision stating that it disagrees with the lower court's reasoning but agrees that the petitioner is not entitled to relief.

Third, looking through allows federal habeas courts to respect and give effect to the different ways that states have chosen to structure their collateral review systems. More specifically, looking through allows federal habeas courts to treat a summary state appellate court decision that is the product of a state collateral review system in which no state court has rendered a reasoned decision *differently* from a summary state appellate court decision that is the product of a state collateral review system in which a lower court has rendered a reasoned decision.

Fourth, I disagree with the majority's argument that looking through is inappropriate because federal appellate courts do not treat their summary decisions as adopting the reasoning of lower courts. Federal practice should not dictate what a state appellate court's summary decision means, particularly where, as here, there is evidence that the Georgia Supreme Court implicitly adopted the lower court's reasoning.

a. Looking Through Accurately Captures What the Georgia Supreme Court Intends its Summary Decisions to Mean.

On the most basic level, the majority opinion's refusal to look through the Georgia Supreme Court's summary denial of an application for a certificate of probable cause offends principles of federalism because it results in federal courts ignoring the superior court's reasoned decision despite evidence that the Georgia Supreme Court implicitly adopted that reasoning.

AEDPA leaves "primary responsibility with the state courts" for adjudicating habeas claims. *Pinholster*, 563 U.S. at 182. But the majority opinion impinges this responsibility by transforming the superior court's reasoned decision into a nullity, upsetting AEDPA's careful balance between the state and federal systems.

The majority opinion treats the superior court's decision as a nullity because the Georgia Supreme Court subsequently issued a decision denying an application for a certificate of probable cause, albeit in a summary opinion. In my view, Georgia's statutory procedures as well as the Georgia Supreme Court's practices support the conclusion that the Georgia Supreme Court's silent denial of an application for a certificate of probable cause indicates agreement with and adoption of the superior court's reasoning. This evidence comes in three forms: (1) the structure of Georgia's collateral review system; (2) the Georgia Supreme Court's practice of issuing reasoned denials of certificates of probable cause when it agrees with the superior court's decision to deny relief but disagrees with the superior court's reasoning; and (3) the Georgia Supreme Court's continued use of summary denials of certificates of probable cause after the United States Supreme Court on direct review implicitly treated the decision as adopting the superior court's reasoning.

First, the way in which Georgia has set up its habeas system suggests that the Georgia Supreme Court's summary denial indicates agreement with the superior court's reasoning. Georgia law requires a petitioner to seek habeas relief in a superior court in the

first instance, O.C.G.A. § 9-14-43, and mandates that the superior court issue a reasoned decision including written findings of fact and conclusions of law, *id.* § 9-14-49. The State limits the scope of appellate review, requiring petitioners to apply for a certificate of probable cause to appeal, *id.* § 9-14-52, and allowing the Georgia Supreme Court to issue a certificate of probable cause only when the petitioner has demonstrated arguable merit. *See Foster*, 136 S. Ct. at 1746 n.2. Although the Georgia Supreme Court may deny an application for a certificate of probable cause in a summary decision, the superior court must first render a reasoned decision.[16] *See* O.C.G.A. § 9-14-49.

Second, the Georgia Supreme Court's practice of issuing a reasoned denial of an application for a certificate of probable cause when it disagrees with the superior court's reasoning but agrees with the result further supports the conclusion that the Georgia Supreme Court's summary denial indicates agreement

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[16] Other states, like Georgia, have adopted systems that permit their appellate courts to resolve appeals from denials of habeas relief in summary decisions on the merits. In Florida, habeas petitioners not sentenced to the death penalty may appeal state habeas trial court decisions to Florida's intermediate appellate courts as a matter of right. *See* Fla. R. Crim. P. 3.850(k); *Johnson v. Wainwright*, 230 So. 2d 700, 701-02 (Fla. Dist. Ct. App. 1970). And Florida's intermediate appellate courts may summarily affirm the denial of relief. *See, e.g.*, *Shelton v. Sec'y Dep't of Corr.*, 691 F.3d 1348, 1353 (11th Cir. 2012). Likewise, Oregon appellate courts may issue summary decisions on the merits when reviewing lower court decisions denying habeas relief. *See Moore v. Palmateer*, 26 P.3d 191 (Or. Ct. App. 2001).

with the superior court's reasoning. Although the Georgia Supreme Court routinely denies applications for certificates of probable cause in summary decisions, it has sometimes provided reasons why it denied an application when it agreed with the result the superior court reached – that is, the denial of relief – but disagreed with the superior court's reasons. For example, the Georgia Supreme Court explained in *Tollette v. Upton* that it denied an application because, although the superior court applied the incorrect legal standard to evaluate prejudice, under the correct standard the petitioner failed to demonstrate that his claim had arguable merit. *Tollette v. Upton*, No. 513E1348 (Ga. Mar. 28, 2014); *see also Rivera v. Humphrey*, No. 513E0063 (Ga. Sept. 9, 2013) (denying application for certificate of probable cause even though superior court applied the wrong standard because "after independently applying the correct legal principle to the facts as found by the [superior] court, . . . we conclude that the Petitioner's claim is without arguable merit"); *Pace v. Schofield*, No. S08E049 (Ga. Jan. 12, 2009) (concluding that superior court's prejudice analysis was erroneous but denying application because "there is no arguable merit to the Petitioner's ineffective assistance of counsel claims").

Third, as I explain in greater detail in the next subsection, the United States Supreme Court has on direct review treated the Georgia Supreme Court's summary denial of an application for a certificate of

probable cause as adopting the superior court's reasoning.[17] Despite knowing that, at least on direct review, the United States Supreme Court will treat its summary denial as adopting the superior court's reasoning, the Georgia Supreme Court has continued to deny applications for certificates of probable cause in summary orders. The continued practice shows that the Georgia Supreme Court intends its silence to indicate consent. Put another way, the Georgia Supreme Court's practice supports the conclusion that it "generally . . . affirm[s] without further discussion when [it] agree[s], not when [it] disagree[s], with the reasons given below." *Ylst*, 501 U.S. at 804.

I agree with the majority that under AEDPA we must give state court decisions "the benefit of the doubt." Maj. Op. at 24 (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)). But I do not believe that this principle

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[17] Certainly, the same principles do not always apply on the Supreme Court's direct review of state habeas decisions under 28 U.S.C. § 1257(a) and federal habeas review of state court decisions under AEDPA. But the majority presents no compelling reason why the meaning of a Georgia Supreme Court decision should vary between the two contexts. Despite the differences between direct and collateral review, the Supreme Court has applied principles from direct review cases to federal habeas cases when an issue is "common to both direct and habeas review." *Harris v. Reed*, 489 U.S. 255, 263 (1989). Moreover, the majority itself recognizes that principles from direct review cases can apply to federal habeas review under AEDPA. *See* Maj. Op. at 9 (looking to *Foster*, a direct review case addressing whether the summary denial of a certificate of probable cause is a decision on the merits subject to review on a writ of certiorari, to understand whether the same decision also qualifies as an adjudication on the merits under § 2254(d)).

is in any way inconsistent with the presumption that the Georgia Supreme Court agrees with the superior court's reasoning when it issues a summary denial of a certificate of probable cause.

b. Looking Through Imposes No Opinion-Writing Standard.

The majority attacks the look-through presumption as inconsistent with federalism because it "impose[s] opinion-writing standards on state appellate courts." *Id.* at 22. It certainly is true that the Supreme Court has expressed concern about federal habeas courts using AEDPA to impose opinion-writing standards on state courts. *See Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013). But I disagree that looking through would pressure the Georgia Supreme Court to "provide a statement of reasons" when it disagrees with the superior court's reasons for denying relief to negate a look-through presumption. Maj. Op. at 22. The Georgia Supreme Court could simply issue a one-line order denying an application for a certificate of probable cause that indicates agreement with the result the superior court reached but not the lower court's reasons for rejecting the petitioner's claim.[18] A

[18] The majority contends that because the Georgia Supreme Court would have to issue this one-sentence order to overcome the look-through presumption, looking through would impose an opinion-writing standard. I suppose that is literally correct, but any burden would be minimal, limited to a form sentence that could be used with little more trouble than the sentence that the Georgia Supreme Court most frequently uses, "it is ordered that [the application] be hereby denied."

federal habeas court would not look through that decision because the presumption that the Georgia Supreme Court adopted the superior court's reasoning would be overcome, *see Ylst*, 501 U.S. at 804, and the federal court would then review the Georgia Supreme Court's decision under the unexplained-decision approach.

But even if the Georgia Supreme Court chooses to explain why it denied the petitioner's application, I cannot agree that looking through creates an undue opinion-writing burden because on direct review under 28 U.S.C. § 1257(a) the United States Supreme Court already presumes that the Georgia Supreme Court's summary decisions adopt the reasoning in the lower court's decision. As a result, the Georgia Supreme Court presently has an incentive to state when it disagrees with the superior court's rationale regardless of whether federal habeas courts look through.[19] *See Foster*, 136 S. Ct. 1737; *Sears v. Upton*, 561 U.S. 945 (2010).

In *Sears*, on direct review under § 1257(a), the United States Supreme Court looked through the Georgia Supreme Court's summary decision denying an application for a certificate of probable cause, presuming that it denied the application for the reasons set forth in the superior court's decision. *See, e.g.*, *Sears*, 561 U.S. at 953-54 ("There are two errors in the state court's analysis of Sears' Sixth Amendment

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[19] This statutory provision provides that "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had [] may be reviewed by the Supreme Court." 28 U.S.C. § 1257(a).

claim."). Because the superior court – and thus, implicitly the Georgia Supreme Court – improperly applied the prejudice prong in its analysis of Sears's ineffective assistance of counsel claim, the United States Supreme Court vacated and remanded for the state court to apply the proper standard. *Id.* at 946.[20]

And again in *Foster*, the Supreme Court on direct review looked through the Georgia Supreme Court's summary denial of a certificate of probable cause to the superior court's reasons for denying the petitioner's claim. A threshold issue in *Foster* was whether the Georgia Supreme Court's denial of a certificate of probable cause rested on federal or state law grounds. *Foster*, 136 S. Ct. at 1746 n.3. Even though it was reviewing the Georgia Supreme Court's decision, the United States Supreme Court referred to the superior court as "the state habeas court" and looked through to the superior court's analysis. *Id.* at 1745-46. The dissent in *Foster* criticized the majority for "attributing

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[20] Although the Supreme Court has stated that it "rarely" reviews under § 1257(a) state court decisions denying collateral relief, *Lawrence v. Florida*, 549 U.S. 327, 335 (2007), as at least one Supreme Court justice has observed, recently the Supreme Court has reviewed such decisions under § 1257(a) more frequently. *See Foster*, 136 S. Ct. at 1760-61 (Alito, J., concurring) (discussing trend of Supreme Court granting certiorari under § 1257(a) to review state court decisions denying postconviction relief). Indeed, just last term in at least four cases the Supreme Court granted review under § 1257(a) and reversed (or vacated) the state court decision denying collateral relief. *See Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Foster*, 136 S. Ct. at 1755; *Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

. . . [the] Superior Court's reasoning to the Supreme Court of Georgia," warning that the majority had "impose[d] an opinion-writing requirement on the States' highest courts" by forcing them to write "reasoned opinions" to avoid reversal on direct review. *Id.* at 1764-65 (Thomas, J., dissenting). Nevertheless, the majority in *Foster* looked through, implicitly rejecting the dissent's argument that the Court was imposing a forbidden opinion-writing burden.

Since *Sears*, then, the Georgia Supreme Court has been on notice that if it summarily denies an application for a certificate of probable cause, the United States Supreme Court – at least on direct review under § 1257(a) – will treat its summary decision as implicitly adopting the superior court's reasoning and will vacate its judgment if the superior court's reasoning is flawed. Accordingly, I fail to see how looking through under § 2254(d) would impose an improper opinion-writing standard.

c. Looking Through Respects Differences in How States Have Structured Their Habeas Systems.

The majority opinion requires federal habeas courts to apply the unexplained-decision approach to review all summary state court decisions, regardless of whether the state habeas system requires a reasoned decision from a lower court. But the majority opinion's approach violates the principles of comity and federalism that underlie AEDPA because it fails to respect

differences in how the states have chosen to structure their systems. *See Younger v. Harris*, 401 U.S. 37, 44 (1971) (recognizing that comity requires "a proper respect for state functions" and "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"). Proper respect requires federal habeas courts to treat summary state appellate decisions that are rendered after a lower court issued a reasoned decision differently from summary state appellate court decisions when there is no reasoned decision from a lower court.

To illustrate why such summary decisions should not be treated identically, I compare the California and Georgia state collateral review systems. California, like Georgia, has structured its collateral review procedures to permit its state supreme court to issue a summary decision rejecting a petitioner's claims on the merits, but its system for reviewing habeas claims otherwise bears little resemblance to Georgia's. California law allows a petitioner to seek relief in the California Supreme Court in the first instance without requiring the California Supreme Court to issue a reasoned decision. *See Richter*, 562 U.S. at 96. Without a previous reasoned decision from any California court, it is impossible for a federal habeas court to attribute any reasons to the California Supreme Court's summary decision.

But, as I described above, collateral review in Georgia is markedly different. Georgia guarantees petitioners at least one reasoned decision addressing

their claims. Thus, there is good reason to infer that the Georgia Supreme Court intends its summary decision to adopt the lower court's reasoning. Looking through allows federal habeas courts to give meaning and effect to these differences in how Georgia and Florida have chosen to structure their state habeas systems.

At bottom, the majority takes the position that federal habeas courts must review all summary state court decisions in one uniform way. Although the majority exalts the importance of uniformity, the majority also would have federal habeas courts draw simultaneous, inconsistent conclusions about what a single state appellate court's summary decision means. Petitioners frequently raise more than one claim in a state habeas petition, and state habeas trial courts may issue a single order addressing all of the claims. As in this case, the state habeas trial court may conclude that some of the petitioner's claims are procedurally defaulted and others fail on the merits. Or the state court may decide that a claim is procedurally defaulted and, in the alternative, fails on the merits. When a state appellate court issues a summary decision rejecting the petitioner's appeal, the majority would have the federal habeas court draw inconsistent conclusions about what the state appellate court's silence means. With respect to the procedurally defaulted claims, the majority opinion would have a federal court treat the state appellate court's silence as indicating agreement with the trial court's decision to deny the claim on state law procedural grounds. *See Ylst*, 501 U.S. at 804.

At the same time, with respect to the claims the state trial court addressed on the merits, the majority opinion would have the federal court reject the conclusion that the state appellate court through its silence adopted the lower court's reasoning.

I am concerned that by embracing a look-through presumption for purposes of identifying whether the state appellate court applied a procedural default but rejecting it for purposes of identifying the grounds on which the state appellate court rejected the petitioner's claims, the majority opinion fails "to afford state courts due respect" and offends principles of federalism. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Indeed, the majority offers no credible explanation why a federal habeas court can draw simultaneous inconsistent conclusions about the meaning of a state appellate court's summary decision. In the absence of any explanation, it could appear that federal habeas courts are reading summary state court decisions so as to impose the most onerous burden upon habeas petitioners – that is, looking through to preserve procedural defaults (and thus bar federal habeas courts from reviewing the merits of the petitioner's claims) but refusing to look through so that habeas petitioners must meet the more demanding inquiry under the unexplained-decision approach when the summary decision was on the merits.

d. Deferring to How Federal Appellate Courts Understand Their Summary Decisions Violates Federalism Principles.

The majority contends that federal habeas courts should not adopt a look-through presumption because when federal appellate courts summarily affirm decisions from lower courts, they do not necessarily adopt the lower court's reasoning. The majority assumes that a state appellate court's summary decision carries the same meaning on federal habeas review that federal appellate courts assign to their own summary decisions. This position is unprincipled and inconsistent with federalism.

It is true that the United States Supreme Court and federal appellate courts have said that their summary affirmances do not adopt the reasoning of the lower court. The Supreme Court has explained, for example, that only what "was essential to sustain" the lower court's judgment may be read into its summary decisions. *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983); *see Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 n.24 (1983). This is because the Supreme Court, like all federal appellate courts, may affirm a lower court decision for any reason. As such, the meaning assigned to a federal appellate court's summary decision is limited to "the precise issues presented and necessarily decided" in the summary decision. *Anderson*, 460 U.S. at 784 n.5 (internal quotation marks omitted).

Because federal review of state habeas decisions is unique, however, it strikes me as inappropriate that the federal courts' practice in another context should dictate what a state appellate court's summary decision means in that state's system. Indeed, the majority opinion cites no authority to support its assumption that federal practice should control. The majority's assumption that federal appellate practice should control what we understand a state appellate court's summary decision to mean is flawed for at least two reasons: (1) it is inconsistent with *Ylst*, in which the Supreme Court did not look to federal practice to understand the meaning of a state appellate court's summary affirmance and (2) at least with respect to Georgia, it offends federalism and comity given the evidence that the Georgia Supreme Court implicitly adopts a superior court's reasoning when it summary [sic] denies an application for a certificate of probable cause.

First, in *Ylst*, despite suggesting that a state appellate court's summary orders "are not meant to convey *anything as* to the reason for the decision," the Supreme Court treated a state appellate court's summary decision as adopting the grounds in the last reasoned state court decision. *Ylst*, 501 U.S. at 803-04 (emphasis in original). The Supreme Court thus ascribed far greater meaning to a state court's summary affirmance than federal courts give their own summary affirmances. Significantly, though, the Supreme Court found it unnecessary to mention that it was treating a summary state appellate court decision differently from the way federal appellate courts treat

their own summary decisions. To me this demonstrates that we are not constrained by how federal courts treat their own summary decisions when interpreting what a state appellate court's summary decision means.[21]

Second, as I explained above, decisions from the Georgia Supreme Court demonstrate that it issues summary denials when it agrees, not disagrees, with the superior court's reasons for denying the petitioner's claims. The majority's reliance on how federal courts understand their summary affirmances and corresponding refusal to consider what Georgia's collateral review system and the Georgia Supreme Court's practices tell us about the meaning of its summary decisions fail to afford due respect to principles of comity and federalism. *See Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009) (recognizing it would do a disservice to comity to ignore the highest court of a state's views

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[21] The majority tries to sidestep this issue by contending that under *Ylst* a summary affirmance means only that the state appellate court's decision rested "on the same general ground – that is, a procedural ground or on the merits – as the judgment under review." Maj. Op. at 17. The problem is that *Ylst* went further than treating a summary affirmance as simply indicating an agreement with the general ground reached by the lower court. The Supreme Court explained that a summary affirmance indicates agreement with the lower court's reasons: "silence implies consent . . . and courts generally behave accordingly, affirming without further discussion when they agree . . . with the reasons given below." *Ylst*, 501 U.S. at 804; *see also Hinojosa*, 136 S. Ct. at 1606 (holding *Ylst* presumption was overcome when there was strong evidence that state appellate court did not agree with specific reason given by lower court).

on its laws).[22] I find it is curious that the majority criticizes the look-through presumption as contradicting federalism principles when its position rests on the unsupported assumption that summary decisions from state appellate courts must carry the same meaning that federal appellate courts assign to their own summary decisions.[23]

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[22] The majority points out that Justice Ginsburg concurred in the denial of certiorari in *Hittson* because she agreed with the result reached by our Court but not the reasoning, concluding that the Georgia Supreme Court likewise may deny an application for a certificate of probable cause in a summary order even though it disagrees with the lower court's reasoning. Implicit in this argument is the idea that federal habeas courts should look to how the United States Supreme Court applies its *discretionary* standard for reviewing certiorari petitions, *see* Supreme Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."), to understand what the Georgia Supreme Court's summary denial of a certificate of probable cause means, even though the Georgia Supreme Court's decision is on the merits. I fail to see why the fact that the United States Supreme Court may in its discretion deny a certiorari petition for any reason indicates that the Georgia Supreme Court summarily denies applications for certificates of probable cause for reasons other than those given by the court below, especially in light of the Georgia Supreme Court's practice of issuing reasoned decisions when it denies relief for a reason other than the one stated by the superior court.

[23] The majority also suggests that a federal habeas court that looks through violates principles of federalism because it improperly "review[s] the entire process by which a prisoner's federal claim was adjudicated" instead of determining whether the last state-court decision is entitled to deference. Maj. Op. at 26. This suggestion relies on the assertion that looking through requires a federal habeas court to review the entire state court proceedings because the federal court would have to consider the lower state

III. CONCLUSION

I fear that the majority opinion's application of the unexplained-decision approach to review a summary decision of the Georgia Supreme Court will deprive petitioners of federal habeas relief, eroding the guarantees of the Great Writ. I cannot agree that to pierce AEDPA deference a habeas petitioner must show that the Georgia Supreme Court's denial of an application for a certificate of probable cause was unreasonable. I believe that federal habeas courts should presume that the state appellate court's summary decision under review adopted the lower court's reasons for rejecting the petitioner's claims. When the presumption has not been overcome by strong evidence, a federal habeas court should review whether the arguments or theories in the superior court's decision are entitled to deference under the reasoned-decision approach.

The majority's decision today requires federal habeas courts under § 2254(d) to defer to a summary decision of the Georgia Supreme Court so long as a

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court decision and briefing before the state appellate court to determine whether the look-through presumption is overcome. But I see no problem because a federal habeas court would look to briefing before the state appellate court only as part of the threshold inquiry to identify the *content* of the state court decision. The Supreme Court has recognized that a federal habeas court reviewing a state court decision has a "duty . . . to determine the scope of the relevant state court judgment." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Importantly, the federal habeas court would not use the state court briefing to determine whether the state appellate court's summary decision, which implicitly adopted the arguments or theories set forth in the lower court's reasoned decision, was entitled to deference.

federal court can conjure up any ground upon which relief reasonably could have been denied, even when the superior court's reasoning was contrary to clearly established law. To reach this result, the majority ignores United States Supreme Court cases that direct us to presume that the Georgia Supreme Court silently adopted the superior court's reasoning. And the majority ignores the evidence that the Georgia Supreme Court intends and understands its summary denials to mean that it agrees with the superior court's reasoning. Instead, the majority relies on the unsupported assumption that federal cases addressing the meaning federal appellate courts assign their summary decisions dictate what the Georgia Supreme Court's summary decisions mean. Rather than working the careful balance between the state and federal system that AEDPA and our Constitution require, the majority opinion does the very opposite. I therefore dissent.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10681

D.C. Docket No. 5:10-cv-00489-MTT

MARION WILSON, JR.,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(November 15, 2016)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and JORDAN, Circuit Judges.

PER CURIAM:

Upon the majority vote of the judges in this Court in active service, on July 30, 2015, this Court vacated this panel's prior opinion and granted rehearing en banc. We concluded that when reviewing a state prisoner's petition for a writ of habeas corpus, federal

courts need not "look through" a summary decision on the merits to review the reasoning of the state trial court. *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1230 (11th Cir. 2016). We also held that the summary denial of a certificate of probable cause to appeal by the Supreme Court of Georgia was an adjudication on the merits for purposes of our review. *Id.* at 1235.

The en banc Court remanded to the panel all outstanding issues in this appeal, and we ordered and received supplemental briefing from the parties. The original panel opinion reviewed the "one-line decision of the Supreme Court of Georgia denying Wilson's certificate of probable cause . . . because it is the final decision on the merits." *Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671, 678 (11th Cir. 2014) (internal quotation marks omitted), *reh'g en banc granted, op. vacated*, No. 14-10681 (11th Cir. July 30, 2015). And the panel "[could] not say that the decision of the Supreme Court of Georgia to deny Wilson's petition . . . 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 681 (quoting 28 U.S.C. § 2254(d)(1)). Because the panel opinion reviewed the correct state-court decision and the remaining issues have not changed, we reinstate the original panel opinion and affirm the denial of Wilson's petition for a writ of habeas corpus.

AFFIRMED.